

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Corrected

~~77-8451~~

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

~~No. 77-2141~~
77-2141
B
A.S.

JAMES TRACY, WILLIAM ADAMS, ROBERT ARNOLD, ARTHUR
BETSCH, SANTOS CEPEDA, DOUGLAS COLEMAN, HAROLD
GONZALEZ, LENNELL HOWARD, ELLIOT HUNT, BILLY LITTLE,
LARRY MOORE, ROBERT OAKLEY, EMANUEL ORDINE, JR.,
LARRY PLEASANT, GEORGE REED, ANTHONY REPPETTI,
CORDELL ROBINSON, WILLIAM RODRIGUEZ, DENNIS SOARES,
MICHAEL THOMAS, and JOHN TURRISI, on behalf of
themselves and all others similarly situated,

Plaintiffs-Appellees,

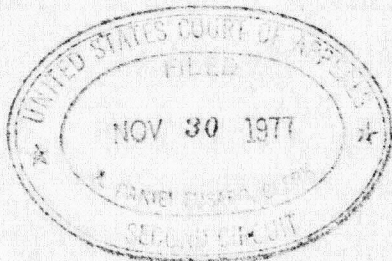
- against -

DOMINICK SALAMACK, Superintendent, Bayview
Correctional Facility; CAPTAIN HYLAN T. SPERBECK,
Correction Officer, Bayview Correctional Facility;
BENJAMIN WARD, Commissioner, Department of
Correctional Services, State of New York,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX



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State of New York
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Civ. 3937 J. Tracy, etc. vs. S. Dominick, et al.

77 Civ. 3937

PROCEEDINGS LASKER, J.

- 11-77 1. Filed complaint - issued summons.
- 11-77 2. Filed Order granting plttf. to proceed in forma pauperis, Goettel, J.
- 30-77 3. Filed Pltffs Order to Show Cause for Preliminary injunction & Temp. Restraining Order pur. to rule 65 FRCP Ordering dfts. be preliminarily enjoined from terminating the work release status of any member of the plttf. Class without holding a prior hearing as indicated. Further Ordered that up to & including 9-8-77 dfts. be Temp. restrained from transferring any inmate whose temp. release status was revoked without a hearing during August, 1977, to any correctional facility outside the Southern or Eastern District of N.Y., etc..... Broderrick J.
- 29-77 4. Filed Summons and marshals ret. Served:
Hylan T. Sperbeck, Capt. on 8-16-77
Dominick Salernick, Supt. on 8-16-77
Benjamin Ward, Comm. on 8-16-77.
- 12-77 5. Filed AMENDED COMPLAINT.
- 9-19-77 6. Filed Pltffs. Memorandum of Law in support of motion for preliminary injunction.
- 9-19-77 7. Filed Pltffs. Appendix to Memorandum of Law in support of motion for preliminary injunction.
- 9-22-77 8. Filed Memo of Law in Opposition to Pltff's Motion for a preliminary in.
- 9-28-77 9. Filed Pltffs. Affidvt. in support of Temp. Restraining Order.
- 9-28-77 10. Filed Memorandum of Law in reply on Pltffs. motion for preliminary injunction.
- 10-1-77 11. Filed Dfts. Affidvt. of Requested clarification of points.
- 10-17-77 12. Filed Opinion #50423. Dfts. are ordered to reiterate the members of plttf. class (other than those persons as indicated) to the temporary release program, & the dfts., their employees & agents, are enjoined from removing such persons from temporary release program except under the same terms & conditions upon which removal of the members of the plttf. class in Aug. 1977. The effect of this order is stayed until 5:30 P.M. October 19, 1977. Lasker J. (mn)
- 10-26-77 13. Filed Affidvt. by Benjamin Ward submitte to bring to the Court's attention issues to be considered.
- 10-26-77 14. Filed Dfts. Memorandum of law in support of dfts. motion to alter or amend the judgment of this court.
- 10-26-77 15. Filed Dfts. Notice of Motion for an order to alter or amend this court amend to court's judgment dtd. 10-14-77 pur to Rule 59(e) FRCP. Ret. 11-4-77.
- 10-26-77 16. Filed Pltffs. Affidvt in opposition to dfts. motion to alter or amend the judgment. 10-14-77.
- 10-26-77 17. Filed Pltffs. Memorandum of Law in opposition to dfts. motion to alter or amend the judgment.
- 10-26-77 18. Filed Pltffs. Affidvt. F. Ward, Affidvt.
- 10-26-77 19. Filed Opinion #50424. Dfts. are to alter or amend decision & order dtd. 10-14-77. It is illegal to remove any person from such circumstances, & shall be returned to the temp. release program within 30 days from the filing of the order the charges against him and heard & determined in accordance with the requirements for hearings at correctional institutions set forth in Welford v. McQuinn, et al. So Ordered Lasker J. (mn)
- 10-26-77 20. Filed Pltffs. Notice of Appeal from order dtd. 11-7-77 denying dfts. motion to alter or amend judgment of 10-14-77. (re filed notice)

2. Filed Pltffs. Notice of Appeal from order of 10-14-77 in which Court stayed to 11-7-77 is for
 10-14-77 order of 10-14-77. P.M. (mn)

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	NO.	NUMBER	MO.	DAY	YEAR										NO.	NUMBER
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PLAINTIFFS

TRACY, JAMES - on behalf of himself and
all others similarly situated.

DEFENDANTS LASKER, J.

SARANTO, DOMENICK - Superintendent,
Bayview Correctional Facility;
Capt. LAMPERT, HYLAN T., Correction
Officer, Bayview Correctional Facility;
WARD, BENJAMIN - Commissioner, Dept. of
Correctional Services, State of NY.

CAUSE

42:1983 - Alleged denial of State prisoners' due process in work release revocation hearings.

22

Prisoners' Legal Services of NY
By: Susan N. Herman, Joanne Piersma
and Pierce Gerety, Jr.
100 Church St., NYC 10007
285-0370

ATTORNEYS

Louis J. Lefkowitz, Atty Gen. of State of
New York
Two World Trade Center; NYC 10047

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DEPARTMENT
NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed
11-16-77

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JAMES TRACY, WILLIAM ADAMS, ROBERT
ARNOLD, ARTHUR BETSCH, SANTOS
CEPEDA, DOUGLAS COLEMAN, HAROLD
GONZALEZ, LENNELL HOWARD, ELLIOT
HUNT, BILLY LITTLE, LARRY MOORE,
ROBERT OAKLEY, EMANUEL ORDINE, JR.,
LARRY PLEASANT, GEORGE REED, ANTHONY
REPETTI, CORDELL ROBINSON, WILLIAM
RODRIGUEZ, DENNIS SOARES, MICHAEL
THOMAS, and JOHN TURRISI, on behalf
of themselves and all others similarly
situated,

Plaintiffs,

-against-

DOMINICK SALAMACK, Superintendent,
Bayview Correctional Facility;
CAPTAIN SYLAN T. SPERBECK, Correction
Officer, Bayview Correctional Facility;
BENJAMIN WARD, Commissioner, Department
of Correctional Services, State of New
York,

Defendants.
-----X

NOTICE OF APPEAL

77 Civ. 3937
(MEL)

S I R S :

PLEASE TAKE NOTICE that the defendants herein appeal to the United States Court of Appeals for the Second Circuit from the judgment and order of this Court dated October 14, 1977, granting injunctive relief to plaintiffs, and from the judgment and order of this Court dated November 7, 1977, denying defendants' motion to alter or amend the order of October 14, 1977. Defendants hereby appeal from each and every part of the Court's judgments

and orders.

Dated: New York, New York
November 10, 1977

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

Kevin J. McKay
KEVIN J. MCKAY
Assistant Attorney General
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TO: SUSAN W. HERMAN, ESQ.
Prisoners' Legal Services
of New York
100 Church Street
New York, N.Y. 10007

Correctional Institutions—Furloughs and Release Programs, Etc.

CHAPTER 691

An Act to amend the correction law, in relation to temporary release programs and to amend chapter three hundred thirty-nine of the laws of nineteen hundred seventy-two, relating to the expansion of work release programs, establishment of furlough programs and the granting of compassionate and medical leave from institutions under the jurisdiction of the state department of correctional services; and to amend chapter two hundred ninety-nine of the laws of nineteen hundred seventy-four, relating to authorizing, in a city with a population of one million or more, prisoner furloughs in certain cases and to providing that absconding from any such furlough shall constitute a crime, in relation to the duration of the chapter.

Approved Aug. 5, 1977, effective as provided in section 10.

Passed on message of necessity. See Const. art. IX, § 2(b)(2), and McKinney's Legislative Law, § 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section eight hundred fifty-one of the correction law, as amended by chapter nine hundred sixty-six of the laws of nineteen hundred seventy-four, is hereby amended to read as follows:

§ 851. Definitions

As used in this article the following terms have the following meanings:

1. "Institution" means any institution under the jurisdiction of the state department of correctional services.
2. "Eligible inmate" means a person confined in an institution who is eligible for release on parole or who will become eligible for release on parole or conditional release within one year. In the case of a person serving an indeterminate sentence of imprisonment imposed pursuant to the penal law in effect after September one, nineteen hundred sixty-seven, for the purposes of this article parole eligibility shall be upon the expiration of the minimum period of imprisonment fixed by the court or where the court has not fixed any period, after service of the minimum period fixed by the state board of parole. If an inmate is denied release on parole, such inmate shall not be deemed an eligible inmate until he is within one year of his or her next scheduled appearance before the state parole board. No person convicted of any escape or absconding offense defined in article two hundred five of the penal law¹ shall be eligible for temporary release. Notwithstanding the foregoing, no person who is an otherwise eligible inmate who is under sentence for a crime involving: (a) infliction of serious physical injury upon another as defined in the penal law, (b) a sex offense involving forcible compulsion, or (c) any other offense involving the use or threatened use of a deadly weapon may participate in a temporary release program without the written approval of the commissioner. The commissioner shall promulgate regulations giving direction to the temporary release committee at each institution in order to aid such committees in carrying out this mandate.

3. "Work release program" means a program under which eligible inmates may be granted the privilege of leaving the premises of an institution for a period not exceeding fourteen hours in any day for the purpose of on-the-job training or employment, or for any matter necessary to the furtherance of any such purposes.

4. "Furlough program" means a program under which eligible inmates may be granted the privilege of leaving the premises of an institution for a period not exceeding seven days for the purpose of seeking employment, maintaining family ties, solving family problems, seeking post-release housing, attending a short-term educational or vocational training course, or for any matter necessary to the furtherance of any such purposes.

5. "Community services program" means a program under which eligible inmates may be granted the privilege of leaving the premises of an institution for a period not exceeding fourteen hours in any day for the purpose of participation in religious services, volunteer work, or athletic events, or for any matter necessary to the furtherance of any such purposes.

6. "Leave of absence" means a privilege granted to an inmate, who need not be an "eligible inmate," to leave the premises of an institution for the period of time necessary:

(a) to visit his or her father, mother, guardian or former guardian, child, brother, sister or spouse during his or her last illness if death appears to be imminent, or to visit his or her spouse, child, grandchild, parent, grandparent or ancestral aunt or uncle during his or her last illness if death appears to be imminent;

(b) to attend the funeral of such individual; or

(c) to undergo surgery or to receive medical or dental treatment not available in the correctional institution only if deemed absolutely necessary to the health and well-being of the inmate and whose approval is granted by the commissioner or his designated representative.

7. "Educational leave" means a privilege granted to an eligible inmate to leave the premises of an institution for a period not exceeding fourteen hours in any day for the purpose of education or vocational training, or for any matter necessary to the furtherance of any such purposes.

8. "Industrial training leave" means a privilege granted to an eligible inmate to leave the premises of an institution for a period not exceeding fourteen hours in any day for the purpose of participating in an industrial training program, or for any matter necessary to the furtherance of any such purpose.

9. "Temporary release program" means a "work release program," a "furlough program," a "community services program," an "industrial training leave," and an "educational leave," or a "leave of absence."

10. "Extended bounds of confinement" means the area in which an inmate participating in a temporary release program may travel, the routes he or she is permitted to use, the places he or she is authorized to visit, and the hours, days, or specially defined period during which he or she is permitted to be absent from the premises of the institution.

11. "Temporary release committee" means the body of persons, which may include members of the public, appointed pursuant to regulations promulgated by the commissioner to serve at the pleasure of the commissioner for the purpose of formulating, modifying and revoking temporary release programs at an institution.

12. "Superintendent" means the person in charge of an institution, by whatever title he or she may be known.

¹ Penal Law § 205.00 et seq.

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§ 2. Section eight hundred fifty-two of such law, as amended by chapter three hundred thirty-nine of the laws of nineteen hundred seventy-two, is hereby amended to read as follows:

§ 852. Establishment of temporary release

1. The commissioner, guided by consideration for the safety of the community and the welfare of the inmate, shall promulgate rules and regulations consistent review and evaluate all existing rules, regulations and directives relating to current temporary release programs and consistent with the provisions of this article for the administration of temporary release programs, and shall appoint or cause to be appointed a temporary release committee for each institution shall by January first, nineteen hundred seventy-eight promulgate new rules and regulations for the various forms of temporary release. Such rules and regulations shall reflect the purposes of the different programs and shall include but not be limited to selection criteria, supervision and procedures for the disposition of each application.

2. The commissioner shall appoint or cause to be appointed a temporary release committee for each institution which shall meet on a regularly scheduled basis to review all applications for temporary release.

2. 3. Work release programs may be established only at institutions classified by the commissioner as work release facilities. Educational release programs may be established only at those educational institutions which shall maintain attendance records for participating inmates.

3. 4. The commissioner shall designate in the rules and regulations of the department appropriate employees or an appropriate unit of the department to be responsible for (a) securing education, on-the-job training and employment opportunities for inmates who are eligible to participate in a work release program, and (b) supervising inmates during their participation in temporary release programs outside the premises of institutions assisting such inmates in such other manner as necessary or desirable to assure the success of the program.

5. The commissioner shall require that all inmates participating in temporary release programs be assigned to parole officers for supervision. Such parole officers shall be responsible to the commissioner for the purpose of providing such supervision. As part of their supervisory functions the parole officers shall be required to provide reports every two months on each inmate under their supervision. Such reports shall include but not be limited to:

(a) an evaluation of the individual's participation in such program;

(b) a statement of any problems and the manner in which such problems were resolved relative to an individual's participation in such programs; and

(c) a recommendation with respect to the individual's continued participation in the program.

6. The department shall contract with the division of parole for the provision of parole supervision services set forth in subdivision five of this section.

§ 3. Such law is hereby amended by adding thereto two new sections, to be sections eight hundred fifty-three and eight hundred fifty-four, to read, respectively, as follows:

§ 853. Reporting and information

To ensure the accurate maintenance and availability of statistics and records with respect to participation in temporary release programs, the department shall forward to the commission of correction a monthly report relative to the operation of temporary release programs. This report shall include, but not be limited to:

- (a) number of inmate participants in each temporary release program;
- (b) number of inmates participating in temporary release for whom written approval of the commissioner was required pursuant to subdivision two of section eight hundred fifty-one of this chapter;
- (c) number and type of individual programs approved for each participant;
- (d) approved participating employers and educational institutions;
- (e) number of inmates arrested;
- (f) inmates involuntarily returned for violations by institution;
- (g) absconders still at large;
- (h) number of disciplinary proceedings initiated and the results thereof;
- (i) number of temporary release committee decisions appealed and the results thereof by institution;
- (j) reports or information made available to the department with respect to the participation of individuals in such programs, including any incidents of absconding or re-arrest;
- (k) any other information requested by the commission or available to the department with respect to such programs.

§ 854. Evaluation and recommendation

In recognition of the need for an independent evaluation of, and recommendations with respect to, temporary release, the commission of correction shall evaluate and assess the administration and operation of all temporary release programs conducted pursuant to this article and shall submit to the governor and the legislature by March first, nineteen hundred seventy-eight, its findings together with any recommendations with respect to the proper operation or the improvement of such temporary release programs.

§ 4. Section eight hundred fifty-three of such law, as amended by chapter three hundred thirty-nine of the laws of nineteen hundred seventy-two, subdivision two thereof having been amended by chapter nine hundred sixty-six of the laws of nineteen hundred seventy-four, is hereby renumbered to be section eight hundred fifty-five and amended to read as follows:

§ 855. Procedure for temporary release of inmates

1. A person confined in an institution designated for the conduct of work release programs who is, ~~or who within ninety days will become,~~ an eligible inmate, may make application to the temporary release committee of the institution for permission to participate in a work release program.

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2. Any eligible inmate may make application to the temporary release committee for participation in a furlough program or community services program, or for an industrial training leave or educational leave.

3. Any inmate may make application to the temporary release committee for a leave of absence provided, however, that in exigent circumstances such application may be made directly to the superintendent of the institution and the superintendent may exercise all of the powers of the temporary release committee subject, however, to any limitation or requirement set forth in the rules and regulations of the department and subject further to the discretion of the commissioner. All leave of absences provided in exigent circumstances shall state the reasons for approval or disapproval of the application and shall be included in the inmate's institutional parole file.

4. If the temporary release committee determines that a temporary release program for the applicant is consistent with the safety of the community, ~~is in the best interests of rehabilitation and the welfare of~~ the applicant, and is consistent with rules and regulations of the department, the committee, with the assistance of the employees or unit designated by the commissioner pursuant to subdivision ~~three~~ four of section eight hundred fifty-two of this article, shall develop a suitable program of temporary release for the applicant. Consistent with these provisions, any educational leave program shall consider the scheduling of classes to insure a reduction of release time not spent in educational pursuits.

5. The committee shall then prepare a memorandum setting forth the details of the temporary release program including the extended bounds of confinement and any other matter required by rules or regulations of the department. Such memorandum shall be transmitted to the superintendent who may approve or reject the program, subject to rules and regulations promulgated by the commissioner. If the superintendent approves the program, he shall indicate such approval in writing by signing the memorandum. If the superintendent rejects the program, he shall state his reasons in writing and a copy of his statement shall be given to the inmate and to the commissioner and such decision shall be reviewed by the commissioner. If the commissioner rejects the program, he shall state his reasons in writing. A copy of such statement shall be filed in the inmate's institutional file.

6. In order for an applicant to accept a program of temporary release, ~~he~~ such inmate shall agree to be bound by all the terms and conditions thereof and shall indicate such agreement by signing the memorandum of the program immediately below a statement reading as follows: "I accept the foregoing program and agree to be bound by the terms and conditions thereof. I understand that I will be under the supervision of the state department of correctional services while I am away from the premises of the institution and I agree to comply with the instructions of any parole officer or other employee of the department assigned to supervise me. ~~I will carry a copy of this memorandum on my person at all times while I am away from the premises of the institution and I will exhibit it to any peace officer upon his request.~~ I understand that my participation in the program is a privilege which may be revoked at any time, and that if I violate any provision of the program I may be taken into custody by any peace officer and I will be subject to disciplinary procedures. I further understand that if I intentionally fail to return to the institution at or before the time specified in the memorandum I may be found guilty of a felony." Such

agreement shall be placed on file at the institution from which such temporary release is granted.

7. After approving the program of temporary release, the superintendent may then permit an inmate who has accepted such program to go outside the premises of the institution within the limits of the extended bounds of confinement described in the memorandum; provided, however, that no such permission shall become effective in the case of a work release or furlough program prior to the time at which the person to be released becomes an eligible inmate.

8. At least three days before releasing an inmate on a temporary release program, the superintendent shall notify in writing the sheriff or chief of police of the community into which the inmate is to be released.

§ 9. Participation in a temporary release program shall be a privilege. Nothing contained in this article may be construed to confer upon any inmate the right to participate, or to continue to participate, in a temporary release program. The superintendent of the institution may at any time, and upon recommendation of the temporary release committee or of the commissioner or of the chairman of the state board of parole or his designee shall, revoke any inmate's privilege to participate in a program of temporary release in accordance with regulations promulgated by the commissioner.

§ 5. Section eight hundred fifty-four of such law, as amended by chapter three hundred thirty-nine of the laws of nineteen hundred seventy-two, is hereby renumbered to be section eight hundred fifty-six, and amended to read as follows:

§ 856. Conduct of inmates participating in a temporary release program

1. An inmate who is permitted to leave the premises of an institution to participate in a temporary release program shall have on his or her person a copy of the memorandum of that program card identifying him or her as a participant in a temporary release program as signed by the superintendent of the institution at all times while outside the premises of the institution and shall exhibit such copy card to any peace officer upon request of the officer. The commissioner may, by regulation, require such information, including effective dates, to be included in such card as he shall deem necessary and proper.

2. If the inmate violates any provision of the program, or any rule or regulation promulgated by the commissioner for conduct of inmates participating in temporary release programs, he such inmate shall be subject to disciplinary measures to the same extent as if he or she violated a rule or regulation of the commissioner for conduct of inmates within the premises of the institution. The failure of an inmate to voluntarily return to the institution of his confinement more than ten hours after his prescribed time of return shall create a rebuttable presumption that the failure to return was intentional. Any inmate who is found to have intentionally failed to return pursuant to this subdivision shall be an absconder in violation of his temporary release program and will not be an eligible inmate as defined in subdivision two of section eight hundred fifty-one of this chapter. The creation of such rebuttable presumption shall not be admissible in any court of law as

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evidence of the commission of any crime defined in the penal law. A full report of any such violation, a summary of the facts and findings of the disciplinary hearing and disciplinary measures taken, shall be made available to the board for the inmate's next scheduled appearance before the state board of parole including any defense or explanation offered by the inmate in response at such hearing.

3. The provisions of this chapter relating to good behavior allowances shall apply to behavior of inmates while participating in temporary release programs outside the premises of institutions, and such allowances may be granted, withheld, forfeited or cancelled in whole or in part for behavior outside the premises of an institution to the same extent and in the same manner as is provided for behavior of inmates within the premises of institutions.

4. An inmate who is in violation of the provisions of his or her temporary release program may be taken into custody by any peace officer and, in such event, the inmate shall be returned forthwith to either the institution that released him or her, or to the nearest secure facility where greater security is indicated. In any case where the institution is in a county other than the one in which the inmate is apprehended, the officer may deliver the inmate to the nearest institution, jail or lockup and it shall be the duty of the person in charge of said facility to hold such inmate securely until such time as he or she is delivered into the custody of an officer of the institution from which he or she was released. Upon delivering the inmate to an institution, jail or lockup, other than the one from which he the inmate was released, the peace officer who apprehended the inmate shall forthwith notify the superintendent of the institution from which the inmate was released and it shall be the duty of the superintendent to effect the expeditious return of the inmate to the institution.

5. Upon the conclusion or termination of a temporary release program, a full report of the inmate's performance in such program shall be prepared in accordance with regulations of the commissioner. Such report shall include but not be limited to: adjustment to release, supervision contacts, statement of any violations of the terms and conditions of release and of any disciplinary actions taken, and an assessment of the inmate's suitability for parole. Such report shall be made available to the state board of parole for the inmate's next scheduled appearance before such board.

§ 6. Such law is hereby amended by adding thereto a new section, to be section eight hundred fifty-seven, to read as follows:

§ 857. Complaint and abuse review

Any person may submit to the commission of correction any complaint he or she may have concerning programmatic abuses. The commission of correction shall evaluate such complaints and, where indicated, conduct any needed investigation. If the commission concludes that a complaint is valid, the commission shall make recommendations to the department for corrective action. Where the commission believes sufficient evidence exists to support a criminal charge, the commission shall report such evidence to the appropriate law enforcement agencies.

§ 7. Sections eight hundred fifty-five through eight hundred fifty-eight of such law, as added by chapter four hundred seventy-two of the

laws of nineteen hundred sixty-nine, are hereby renumbered to be sections eight hundred fifty-eight through eight hundred sixty-one, respectively.

§ 8. Section ten of chapter three hundred thirty-nine of the laws of nineteen hundred seventy-two, relating to the expansion of work release programs, establishment of furlough programs and the granting of compassionate and medical leave from institutions under the jurisdiction of the state department of correctional services, as amended by chapter four hundred seventy-one of the laws of nineteen hundred seventy-six, is hereby amended to read as follows:

§ 10. This act shall take effect thirty days after it shall have become a law and shall remain in effect until the first day of September, nineteen hundred ~~seventy-seven~~ seventy-eight.

§ 9. Section two of chapter two hundred ninety-nine of the laws of nineteen hundred seventy-four, relating to authorizing, in a city with a population of one million or more, prisoner furloughs in certain cases, as amended by chapter four hundred seventy-three of the laws of nineteen hundred seventy-six, is hereby amended to read as follows:

§ 2. This act shall take effect immediately and shall remain in effect until the first day of September, nineteen hundred ~~seventy-seven~~ seventy-eight.

§ 10. This act shall take effect on September first, nineteen hundred seventy-seven, provided, however, that subdivision six of section eight hundred fifty-two of the correction law, as added by section two of this act, shall take effect on January first, nineteen hundred seventy-eight.

Crimes and Offenses—Sex Offenses—"Forcible Compulsion"

Memorandum relating to this chapter, see page A-384

CHAPTER 692

An Act to amend the penal law, in relation to the definition of "forcible compulsion" in sex offenses.

Approved Aug. 5, 1977, effective Sept. 1, 1977.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The legislature finds that the likelihood of receiving serious injury during a rape attack increases significantly when the victim resists her attacker, and that futile attempts at physical resistance may very well place the victim's life in jeopardy. The legislature further finds that judicial interpretations of the "earnest resistance" requirement in the forcible rape statute, which require a victim to resist her attacker "to the utmost limit of her power", fail to recognize that unwilling submission may be the only alternative open to the victim as a means of saving her life or avoiding physical injury.

It is the legislature's intention to modify the resistance requirement in the definition of forcible compulsion so that the victim need only offer so much resistance as is reasonable under the circumstances.

§ 2. Subdivision eight of section 130.00 of the penal law is hereby amended to read as follows:

8. "Forcible compulsion" means physical force ~~that overcomes~~ which is capable of overcoming earnest resistance; or a threat, express or

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1123

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

JAMES TRACY, on behalf of himself and all
others similarly situated,

Plaintiffs,

v.

DOMINICK SALAMACK, Superintendent, Bayview
Correctional Facility; Captain HYLAN T.
SPERBECK, Correction Officer, Bayview
Correctional Facility; BENJAMIN WARD,
Commissioner, Department of Correctional
Services,

Defendants.

SUMMONS

To the above named Defendant : CAPTAIN HYLAN T. SPERBECK
Bayview Correctional Facility
You are hereby summoned and required to serve upon
SUSAN N. HERMAN
PIERCE GERETY, JR.
PRISONERS' LEGAL SERVICES OF NEW YORK

plaintiff's attorney, whose address
100 Church Street
New York, New York 10007

an answer to the complaint which is herewith served upon you, within 20 days after service of this
summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be
taken against you for the relief demanded in the complaint.

RAYMOND P. BURCHARDT

Clerk of Court.

M. C. BERRAN

Deputy Clerk.

Date:

AUG 11 1977

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JAMES TRACY, on behalf of himself
and all others similarly situated,

Plaintiffs,

- against -

DOMINICK SALAMACK, Superintendent,
Bayview Correctional Facility;
Captain HYLAN T. SPERBECK, Correction
Officer, Bayview Correctional
Facility; BENJAMIN WARD, Commissioner,
Department of Correctional Services,
State of New York,

Defendants.
-----X

COMPLAINT
CLASS ACTION

JUDGE LITNER

JURISDICTION

1. This is an action brought by inmates in the custody of the New York State Department of Correctional Services, seeking declaratory, injunctive and monetary relief to redress violation by defendants, acting under color of state law as officials of the State of New York, of rights guaranteed to plaintiffs under Title 42 U.S.C. §1983, and the Fourteenth Amendment to the Constitution of the United States.

2. Jurisdiction is conferred upon this Court by Title 28 U.S.C. §§1343(3) and (4), and 2201. This Court's pendent jurisdiction is also invoked on the ground that the acts challenged herein are in contravention of the laws and regulations of the State of New York.

CLASS ACTION

3. This action is brought as a class action pursuant to Rule 23(a) and (b)(1) and (2) of the Federal Rules of Civil Procedure.

(a) Plaintiff is an inmate in the custody of the New York State Department of Correctional Services suing on behalf of all inmates who have participated in New York State's Temporary Work Release Program for State Correctional Institutions, pursuant to New York Correction Law §§851 et seq. (hereinafter "work release") and who have had their status as work release participants revoked, and all inmates who are or will be participating in the work release program, to challenge the constitutionality of the procedures by which work release status is revoked.

(b) Upon information and belief, approximately 3,000 New York State inmates participated in the work and educational release program during 1976, and approximately the same number of inmates will be participating in these programs during 1977. Upon information and belief, a sizeable number of work release participants suffer revocation of their work release status each year. Accordingly, the class is so numerous that joinder of all of its members is impracticable. Upon information and belief, the number and identities of the inmates who have had their status as work release participants revoked are reflected by records within the control of defendants, not known to plaintiff at this time.

(c) Defendants' procedures governing work release revocation are applicable to all inmates who have been

or will be subject to work release revocation. Accordingly, there are questions of law and fact common to all members of the class, including the question of whether defendants' procedures for work release revocation are adequate under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The declaratory and injunctive relief sought will apply to all members of the class.

(d) The claims of the representative plaintiff are typical of the claims of all members of the class. Plaintiff TRACY participated in the work release program at the Bayview Correctional Facility from March 15, 1976 to December 13, 1976. On December 29, 1976, without having been afforded his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, plaintiff TRACY was removed from the work release program and transferred to the Auburn Correctional Facility, a maximum security institution, thereby losing wages and opportunities for vocational training and experience. He will fairly and adequately protect the interests of the class.

(e) Because the procedures employed by defendants in revoking work release status are applicable to all members of the class, inconsistent or varying adjudications with respect to individual members of the class would establish incompatible standards of conduct for defendants.

(f) In using the current procedures for revoking work release status, defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

(g) Plaintiff's attorneys are associated with Prisoners' Legal Services of New York, a state-wide not-for-profit corporation funded by the New York State Division of Criminal Justice Services to provide legal services to indigent inmates of New York State correctional facilities. Attorneys associated with Prisoners' Legal Services are familiar with the conduct of litigation of this kind, and will afford adequate representation to the class.

PARTIES

4. Plaintiffs are adult citizens of the United States in the custody of the New York State Department of Correctional Services who have been, are or will be participating in the work release program. Plaintiff JAMES TRACY participated in the work release program, had his status revoked and is currently incarcerated at the Auburn Correctional Facility, Auburn, New York.

5. Defendants are residents of the State of New York, sued individually and in their official capacities as officials and employees of the New York State Department of Correctional Services.

6. Defendant DOMINICK SALAMACK is Superintendent of the Bayview Correctional Facility, designated by defendants as a work release facility. He is responsible for the lawful management and supervision of that facility, and for the humane treatment of inmates confined therein. He is also vested with authority to revoke any inmate's work release status.

7. Defendant Captain HYLAN T. SPERBECK is a correction officer employed by the New York State Department of Correctional Services, assigned to the Bayview Correctional Facility at all times relevant to the events described herein.

8. Defendant BENJAMIN WARD is the Commissioner of the New York State Department of Correctional Services and, as such, is its chief executive officer. He is responsible for the maintenance, operation and administration of all New York State correctional facilities. He is also responsible for promulgating rules and regulations for the administration of the work release program.

9. At all times relevant to the events described herein, defendants were employed by and acting under color of the law of the State of New York.

FACTS

10. Plaintiff TRACY has been in the custody of the New York State Department of Correctional Services since January, 1974. On or about March 13, 1976, having been approved for participation in the temporary release program, plaintiff TRACY was transferred from the Wallkill Correctional Facility, a medium security institution, to the Bayview Correctional Facility.

11. The Bayview Correctional Facility ("Bayview") is a minimum security correctional facility, located in New York, New York, and designated as a facility to be used by work release participants.

12. On or about March 13, 1976, plaintiff TRACY began an educational training program at the Bulova School of Watchmaking.

13. On or about November 2, 1976, plaintiff TRACY secured employment at the Harlem Variety Store, and received approval for a transfer from the educational release program to the work release program.

14. On or about November 2, 1976, plaintiff TRACY signed a work release agreement, under the terms of which he was permitted to be at liberty for up to eleven hours each working day, permitted to travel on his own, in civilian clothing, to and from his place of employment, and permitted to purchase his own lunches.

15. Plaintiff TRACY worked at the Harlem Variety Store from approximately November 2, 1976 until December 12, 1976, receiving take-home pay of approximately \$77 per week, all of which was to be placed in an account to be paid to plaintiff upon his release from custody, minus certain charges for costs incurred.

16. On or about November 2, plaintiff TRACY was advised by his employer that he would be paid in cash instead of by check, as originally planned.

17. Plaintiff TRACY promptly advised his parole officer, Mr. Goergan, that he was to be paid in cash and Parole Officer Goergan made a notation on plaintiff TRACY's copy of the work release agreement indicating this change.

18. From November 3 until December 12, plaintiff TRACY turned in the cash paid to him promptly after he was paid.

19. On or about December 15, 1976, plaintiff TRACY was called before the Adjustment Committee to answer charges

of being late in returning to Bayview. He was ordered to remain confined in the facility and the matter was referred to the Temporary Release Committee.

20. Upon information and belief, on or about December 20, 1976, Parole Officer Goergan visited the Harlem Variety Store and spoke with Mr. Crooks, the proprietor of the store.

21. Shortly thereafter, Parole Officer Goergan advised plaintiff that Mr. Crooks had stated that plaintiff had worked in the store for only one week.

22. Plaintiff informed Parole Officer Goergan that Mr. Crooks was only present at the store at night, after plaintiff had finished work, and therefore would not know whether plaintiff was working or not. Plaintiff advised Parole Officer Goergan to speak with Mr. Ike, the manager of the store, who supervised plaintiff's work and who would attest to the fact that plaintiff had worked in the store continuously since November 2.

23. Upon information and belief, Parole Officer Goergan did not contact or attempt to contact Mr. Ike.

24. As a result of Parole Officer Goergan's report, plaintiff was charged with failure to comply with temporary release procedure by, (a) turning in cash instead of paychecks; (b) being "outside the bounds of confinement" (i.e., not at work) from November 8 until December 12; (c) misusing the memorandum of agreement and failing to inform his parole officer of the loss of his job; (d) lying to the staff; and (e) returning late from his job. (See Exhibit A, attached.)

25. On or about December 22, 1976, Correction Officer Jose Velez, an employee of the New York State Department of Correctional Services employed at Bayview, delivered a copy of formal charges to plaintiff charging the infractions described in paragraph 24, supra.

26. Velez, who had been designated as plaintiff's employee assistant pursuant to Title 7 of the New York Code of Rules and Regulations §253.3, advised plaintiff that a Superintendent's Proceeding was to be held to resolve the charges against him.

27. Plaintiff asked Velez to assist him by contacting Mr. Ike, who would verify that plaintiff had worked at the Harlem Variety Store from November 2 through December 12, thereby showing that plaintiff was not guilty of having been outside the bounds of his confinement, lying to the staff, or misusing the memorandum of agreement; and who would also verify that plaintiff had been paid by cash rather than by check.

28. Velez advised plaintiff that he was only there to deliver the formal charges, and would not undertake this investigation on plaintiff's behalf.

29. Plaintiff requested Velez to find an attorney to assist him in preparing a defense against the charges, but, upon information and belief, Velez did not do so.

30. Plaintiff spoke with Reverend Downing, the institutional chaplain, and asked Reverend Downing to assist him by contacting Mr. Ike.

31. Upon information and belief, Reverend Downing visited the Harlem Variety Store on or about December 24, 1976, and spoke with Mr. Ike. On December 25, 1976, Reverend Downing advised plaintiff that Mr. Ike had verified plaintiff's account of the duration of his employment.

32. On December 27, 1976, a Superintendent's Proceeding, conducted by defendant SPERBECK, was held at Bayview to resolve the charges against plaintiff.

33. At this proceeding, plaintiff admitted that he had been late in returning from work on a number of occasions and explained that he was not guilty of failing to turn in his paycheck because he had been paid in cash, as described in paragraph 18, supra. Plaintiff also stated that he had been working at the Variety Store from November 2 until December 13, and explained that Mr. Crooks would not have known whether or not plaintiff was working because Mr. Crooks was only present in the store at night. Plaintiff explained that Mr. Ike would verify his employment, advised the hearing officer that Reverend Downing had spoken to Mr. Ike, and further advised the hearing officer that Reverend Downing had agreed to go to the store to obtain a statement from Mr. Ike on that same day, December 27.

34. At the end of the proceeding of December 27, defendant SPERBECK found plaintiff guilty of excessive lateness and imposed a punishment upon plaintiff by assessing 60 days of good behavior allowance.

35. As to the other charges, defendant SPERBECK stated that he would adjourn the hearing until he could "check with Reverend Downing" and some of the parole officers involved.

36. On December 29, the hearing resumed, conducted again by defendant SPERBECK. Defendant SPERBECK stated, "I haven't heard anything from Reverend Downing, which as far as I'm concerned, Reverend Downing shouldn't even be involved in this anyway. It's not his job."

37. Defendant SPERBECK then repeated the report of Parole Officer Goergan advising that Mr. Crooks had stated that plaintiff had worked at the store for only one week.

38. Plaintiff made several attempts to explain again that he could prove that Mr. Crooks was mistaken, through Mr. Ike or Reverend Downing, but defendant SPERBECK interrupted him on each occasion, and told him, "The case is closed as far as I'm concerned."

39. Defendant SPERBECK found plaintiff guilty of all of the charges set forth in paragraph 27, supra, and ordered that plaintiff be transferred to a "more structured facility," specifying that this recommendation was a result of his finding that plaintiff was guilty of having been outside the bounds of confinement (i.e., not at work) for over a month, failing to turn in paychecks, and misusing the memorandum of agreement.

40. Upon information and belief, defendant SPERBECK never contacted or attempted to contact Mr. Ike, or any other employee of the Harlem Variety Store.

41. Parole Officer Goergan was not present at the proceeding of December 27 or the proceeding of December 29.

42. Reverend Downing was not present at the proceeding of December 27 or December 29.

43. Mr. Ike was not present at the proceeding of December 27 or December 29.

44. Plaintiff did not have the assistance of counsel or counsel-substitute at the proceeding of December 27 or December 29, or before either of these proceedings.

45. In or about January, 1977, plaintiff was transferred to the Auburn Correctional Facility ("Auburn"), a maximum security institution located at Auburn, New York, where he remains incarcerated.

46. At Auburn, plaintiff is employed within the prison as wing waiter, and receives pay of \$4.80 biweekly.

47. Plaintiff TRACY's family resides in New York City.

48. While at Bayview, plaintiff TRACY visited with his family regularly on weekends. Since his transfer to Auburn in January, plaintiff TRACY has not seen his family at all.

49. Upon information and belief, it is the general policy and practice of defendants to refuse to permit inmates to call witnesses at work release revocation hearings.

50. Upon information and belief, it is the general policy and practice of defendants not to permit inmates at such hearings to confront and cross-examine the persons who have charged them with misbehavior.

51. Upon information and belief, it is the general policy and practice of defendants not to permit inmates at such hearings to be assisted by counsel or counsel-substitute.

52. Defendants' general policies and practices, as alleged in paragraphs 49-51, supra, rendered plaintiff, and have rendered and will render numerous members of plaintiff's class unable to present a meaningful defense to charges brought against them at work release revocation hearings, thereby causing plaintiffs to suffer a grievous loss of liberty and property.

CLAIMS FOR RELIEF

53. By their actions described herein, defendants have violated the rights of plaintiff and the class he represents under the Fourteenth Amendment to the Constitution of the United States.

54. By failing to allow plaintiff and his class the right to assistance of counsel or counsel-substitute, the right to call witnesses, the right to confront and cross-examine witnesses and the right to present a meaningful defense to charges of misconduct prior to revoking work release status, defendants have deprived plaintiff and his class of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

55. By failing to afford plaintiff a choice of employees to assist him at the Superintendent's Proceedings held against him, and by failing to provide plaintiff with adequate assistance in preparing a defense to the charges against him, defendants have violated the rights of plaintiff under Title 7 of the New York Code of Rules and Regulations §253.

WHEREFORE, plaintiff prays that this Court:

I. Adjudge and declare that the procedures and actions hereinabove described are in violation of the rights of plaintiff and his class under the Constitution and laws of the United States and of the State of New York.

II. Enjoin defendant WARD from revoking the work release status of any member of the plaintiff class without holding a prior hearing at which the members of the plaintiff class are guaranteed the right to counsel or counsel-substitute, the right to call witnesses, the right to confront and cross-examine adverse witnesses, and the right to present a meaningful defense.

III. Enjoin defendant WARD to order that plaintiff TRACY, and any other member of the class who so desires, be reinstated in the work release program and transferred to an institution designated as a work release facility.

IV. Enjoin defendant WARD to order the disposition of the Superintendent's Proceeding held against plaintiff TRACY to be fully expunged.

V. Enter judgment against defendants jointly and severally, awarding each plaintiff actual, compensatory and punitive damages.

VI. Award plaintiffs the costs and disbursements of this action, including the reasonable expenses of plaintiffs' attorneys.

VII. Grant such other and additional relief as
the Court may deem just and proper.

SUSAN N. HERMAN
PIERCE GERETY, JR.
PRISONERS' LEGAL SERVICES
OF NEW YORK
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(212) 285-0370

JOANNE PIERMA
PRISONERS' LEGAL SERVICES
OF NEW YORK
411 Larned Building
Syracuse, New York 13202
(315) 474-8741

Attorneys for Plaintiff

Rayview Correctional
FACILITY

SUPERINTENDENT'S PROCEEDING REPORT

(For Automatic Review Dispositions and Notice to Inmate)

74-A-724

1) Name of Inmate James A. Tracy

No. 122 911

Conditional Release Date: 3-30-80

2) Date of Disposition of Charge 12/27/76

3) Time Spent in Confinement or Other Disciplinary Action Taken Prior to this Disposition (specify)

Held in Facility pending Inst proceeding

4) Disposition Ordered

Change of program to a more structured facility for Charge # 1, 2 + 3.
60 days less good time for Charge # 5

5) Summary of the Case Failed to turn in psychics.

- ② Outside bounds of confinement for over a month
- ③ Misused Memo of agreement
- ④ Lying to staff
- ⑤ Has several (10) latenesses.

6) Inmate's Explanation The lateness were not his fault - he was not given enough time.
He even was at work but the manager was mind up about his attendance. He was said in each so he turned it in when he got it.

Nelson T. Spickard
Signature

Inst
Title

12/30/76
Date

DISTRIBUTION: Original - Commissioner
Copy 1 - Facility File
Copy 2 - Inmate
Copy 3 - Service Unit

To inmate: IMPORTANT See reverse side

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JAMES TRACY, on behalf of himself and :
all others similarly situated, :

Plaintiffs, :

- against :

DOMINICK SALAMACK, Superintendent, :
Bayview Correctional Facility; Captain :
HYLAN T. SPERBECK, Correction Officer, :
Bayview Correctional Facility; :
BENJAMIN WARD, Commissioner, Depart- :
ment of Correctional Services of the :
State of New York, :

Defendants. :
-----X

77 Civ. 3937
(MEL)

ORDER TO SHOW CAUSE
FOR PRELIMINARY IN-
JUNCTION AND TEMPORARY
RESTRAINING ORDER

FILED
USD C-SDNY
AUG 29, 1977

Upon the complaint previously filed in this action,
and upon the affidavit of Daniel J. Steinbock, Esq., ~~it is the~~
~~THE AFFIRMATION OF JUDGE MORRIS E. LASKER, IF IS~~
hereby

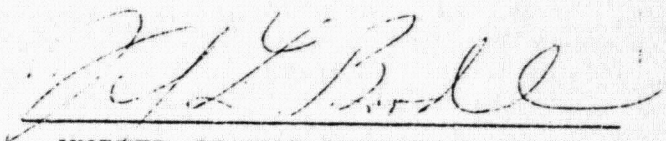
ORDERED that the defendant appear before the
Honorable Morris E. Lasker, a Judge of this Court. in the
United States Courthouse. Foley Square. New York. New York.
^{for conference}
in Room 2703, on the 13th day of September, 1977, at the
hour of 10:00 o'clock in the fore noon of that day, or as
soon thereafter as counsel can be heard, and ^{thereafter} ~~there and then~~
^{at a time and place to be fixed by the Court,}
show cause, if any there be, why this Court should not issue
a preliminary injunction pursuant to Rule 65 of the Federal
Rules of Civil Procedure, ordering

1. That defendants be preliminarily enjoined from terminating the work release status of any member of the plaintiff class without holding a prior hearing at which the members of the plaintiff class are afforded all rights guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution, including but not limited to proper and timely notice, an opportunity to present a defense, the right to counsel or counsel-substitute, the right to call witnesses, the right to confront and cross-examine adverse witnesses, and a statement of the evidence relied upon and reasons for any decision rendered; and

2. That defendant be ordered to restore to the temporary release program all inmates who were participating in the temporary release program and who have had their status revoked during August, 1977, unless and until a hearing consistent with the requirements of due process, as described above, is held as to each inmate; and

up to and including
IT IS FURTHER ORDERED that ~~pending disposition of~~
September 9, 1977
~~the motion for preliminary injunction~~, defendants be and hereby are temporarily restrained from transferring any inmate whose temporary release status was revoked without a hearing during August, 1977, to any correctional facility outside *or Eastern* the Southern District of New York; and
^

IT IS FURTHER ORDERED that personal service of a copy of this order and of the papers upon which the same is granted, on the defendants by service on the Attorney General of the State of New York, 2 World Trade Center, New York, New York, by plaintiffs' attorneys on August 29, 1977 shall be sufficient service of this order.

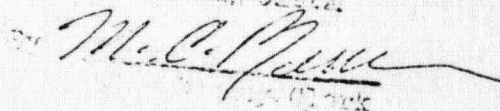


UNITED STATES DISTRICT JUDGE
(PART I)

DATED: New York, New York
August 29th, 1977.

ISSUED: 4³⁵ P. M.

A TRUE COPY
RAYMOND F. BERNARDINI, Clerk


Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

JAMES TRACY, on behalf of himself and :
all others similarly situated,

Plaintiffs, :

77 Civ. 3937
(MEL)

- against - :

AFFIDAVIT

DOMINICK SALAMACK, Superintendent,
Bayview Correctional Facility; Captain :
HYLAN T. SPERBECK, Correction Officer,
Bayview Correctional Facility; :
BENJAMIN WARD, Commissioner, Department
of Correctional Services of the State :
of New York,

Defendants. :

-----X

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

DANIEL J. STEINBOCK, being duly sworn, deposes and says:

1. I am Associate Director of Prisoners' Legal Services of New York, counsel for plaintiffs in this action. I make this affidavit in support of plaintiffs' application for an order to show cause for a preliminary injunction and a temporary restraining order.

2. On August 25, 1977, I received telephone calls from relatives of three inmates of the New York State Department of Correctional Services, James Boggio, Robert Oakley, and Richard Birnie, who had been participating in the New York State Department of Correctional Services work release program

for various periods of time. They informed me that the temporary release status of these three men had been suddenly terminated on August 24 or 25 without notice, a hearing or articulated reasons.

3. In response to this and other information, I called Lewis L. Douglass, Executive Deputy Commissioner of the New York State Department of Correctional Services. He gave me the information contained in paragraphs 4 through 9 below.

4. As of August 25, the Department of Correctional Services terminated the temporary release status of sixteen per cent of the approximately 800 New York State inmates in the temporary release program--approximately 130 persons.

5. These terminations were not based upon any violation by these inmates of the conditions of temporary release or other departmental regulations.

6. None of these inmates was given any notice, any hearing, any opportunity to present a defense or any reasons prior to the termination of his temporary release status, and the department does not intend to give these inmates hearings on the issue of these terminations, or reasons therefor, in the future.

7. These inmates have been, or will be, transferred from temporary release facilities, most of which are located in or near New York City, to other New York State correctional.

facilities, including maximum security institutions, as a result of these terminations.

8. Prompted by the passage of new legislation affecting temporary release, the Department recently reviewed the central office records of inmates on temporary release status. This review culminated in the decisions to terminate the temporary release status of the approximately 130 inmates mentioned in paragraph 4, supra.

9. At the time this review was conducted, the Department had not promulgated any of the guidelines authorized by the new legislation.

10. On information and belief, all or most of the 130 inmates whose temporary release status was revoked were performing satisfactorily in their temporary release programs, and had not violated any of the conditions of temporary release or other departmental regulations.

11. On information and belief, many of the inmates whose temporary release status was revoked had been employed successfully for a period of months prior to the revocation. As a result of their termination from work release, these inmates have lost their jobs and attendant income, as well as the liberty of participating in a program which allowed them to leave the correctional facility for up to fourteen hours per day.

12. If these inmates are not restored to their jobs promptly, I believe there is a great danger that the former employers of these inmates will hire other persons to fill their jobs, causing the inmates irreparable injury.

13. On information and belief, other inmates had been approved for educational release and were scheduled to begin the fall semester at college. If these inmates are not restored to the temporary release program promptly, they will be prevented from beginning school as planned, and thereby will be caused irreparable injury.

14. On information and belief, most or all of the inmates transferred from temporary release facilities as alleged in paragraph 7 supra have been transferred to the Ossining Correctional Facility in Ossining, New York ["Ossining"].

15. On information and belief, most or all of the inmates transferred to Ossining have been or will be scheduled for further transfers to maximum security institutions some of which are located hundreds of miles from the temporary release facilities in or near New York City, and from their families and attorneys.

16. If defendants are permitted to transfer these inmates from Ossining, further transfers will be necessary before the inmates are able to resume work. The concomitant delay in restoring the inmates to work release status will

exacerbate the irreparable injury defendants have caused, and will render it even more likely that the inmates will permanently lose their jobs.

17. On information and belief, it will cause little or no hardship to defendants to retain the inmates in question at prisons in the Southern District of New York pending disposition of plaintiffs' motion for a preliminary injunction.

18. This application is made by order to show cause rather than by notice of motion because defendants' actions have caused and will continue to cause plaintiffs and their class immediate and irreparable injury, and because plaintiffs request immediate remedial relief by the issuance of a temporary restraining order.

19. No prior application has been made for the relief herein requested.

WHEREFORE, deponent respectfully requests that this Court

I. Issue the annexed order to show cause.

II. Issue an order temporarily restraining defendants from transferring any member of the plaintiff class to any correctional facility outside the Southern District of New York pending disposition on plaintiffs' motion for a preliminary injunction; and

III. Grant such other, further and different relief
as to the Court may seem just and proper.

/s/ Daniel J. Steinbock
DANIEL J. STEINBOCK

Sworn to before me this
29th day of August, 1977.

/s/ Helen Bodian
Notary Public

36 A

~~26~~

CLASS ACTION

3. This action is brought as a class action pursuant to Rule 23(a) and (b)(1) and (2) of the Federal Rules of Civil Procedure.

(a) Plaintiffs are inmates in the custody of the New York State Department of Correctional Services suing on behalf of all inmates who have participated in New York State's Temporary Release Program for State Correctional Institutions, pursuant to New York Correction Law §§851 et seq. (hereinafter "temporary release," encompassing work and educational release) and who are or will be participating in the temporary release program, to challenge the constitutionality of the procedures by which temporary release status is revoked.

(b) Upon information and belief, approximately 3,000 New York State inmates participated in the work and educational release program during 1976, and approximately the same number of inmates will be participating in these programs during 1977. Upon information and belief, a sizeable number of temporary release participants suffer revocation of their temporary release status each year. On August 25, 1977 alone, approximately 140 persons suffered revocation of their temporary release status. Accordingly, the class is so numerous that joinder of all of its members is impracticable. Upon information and belief, the number and identities of the inmates who have had their status as temporary release participants revoked are reflected by records within the control of defendants, not known to plaintiffs at this time.

(c) Defendants' policies concerning temporary release revocation are applicable to all inmates who have been or will be subject to temporary release revocation. Accordingly, there are questions of law and fact common to all members of the class, including the question of whether defendants' procedures for temporary release revocation are adequate under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States [hereinafter "the Due Process Clause"]. The declaratory and injunctive relief sought will apply to all members of the class.

(d) The claims of the representative plaintiffs are typical of the claims of all members of the class.

Plaintiff TRACY participated in the work release program at the Bayview Correctional Facility from March 15, 1976 to December 13, 1976. On December 29, 1976, without having been afforded his rights under the Due Process Clause, plaintiff TRACY was removed from the work release program and transferred to the Auburn Correctional Facility, a maximum security institution, thereby losing wages and opportunities for vocational training and experience. The decision removing plaintiff TRACY from the work release program was made pursuant to a charge of misbehavior and a hearing at which plaintiff TRACY was denied rights guaranteed to him by the Due Process Clause.

Plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI participated in the work or educational release

at a variety of institutions, including the Tappan Correctional Facility, for periods of time ranging up to approximately one year. On or about August 25, 1977, without having been afforded their rights under the Due Process Clause, these plaintiffs were summarily removed from the temporary release program and transferred to the Ossining Correctional Facility, a maximum security institution, thereby losing wages and opportunities for educational and vocational training and experience. On information and belief, the decisions removing these plaintiffs and approximately 120 other members of the plaintiff class from the temporary release program were not preceded by any charge or finding of misbehavior or by any hearing.

The named plaintiffs will fairly and adequately protect the interests of the class.

(e) Because the procedures employed by defendants in revoking temporary release status are applicable to all members of the class, inconsistent or varying adjudications with respect to individual members of the class would establish incompatible standards of conduct for defendants.

(f) In failing to formulate and implement constitutionally adequate procedures for revoking temporary release status, defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

(g) Plaintiff's attorneys are associated with Prisoners' Legal Services of New York, a state-wide not-for-profit corporation funded by the New York State Division of Criminal Justice Services to provide legal services to

indigent inmates of New York State correctional facilities. Attorneys associated with Prisoners' Legal Services are familiar with the conduct of litigation of this kind, and will afford adequate representation to the class.

PARTIES

4. Plaintiffs are adult citizens of the United States in the custody of the New York State Department of Correctional Services who have been, are or will be participating in the temporary release program. Each named plaintiff participated in the work or educational release program and had his status revoked. Plaintiff TRACY is currently incarcerated at the Auburn Correctional Facility, Auburn, New York; the other named plaintiffs are currently incarcerated at the Ossining Correctional Facility, Ossining, New York.

5. Defendants are residents of the State of New York, sued individually and in their official capacities as officials and employees of the New York State Department of Correctional Services.

6. Defendant BENJAMIN WARD is the Commissioner of the New York State Department of Correctional Services and, as such, is its chief executive officer. He is responsible for the maintenance, operation and administration of all New York State correctional facilities. He is also responsible for promulgating rules and regulations for the administration of the temporary release program.

7. Defendant DOMINICK SALAMACK is Superintendent of the Bayview Correctional Facility, designated by defendants as a work release facility. He is responsible for the lawful management and supervision of that facility, and for the

humane treatment of inmates confined therein. He is also vested with authority to revoke any inmate's work release status.

8. Defendant Captain HYLAN T. SPERBECK is a correction officer employed by the New York State Department of Correctional Services, assigned to the Bayview Correctional Facility at all times relevant to the events described herein.

9. At all times relevant to the events described herein, defendants were employed by and acting under color of the law of the State of New York.

FACTS

THE TEMPORARY RELEASE PROGRAM

10. The temporary release program, as defined in acts passed by the New York State legislature, permits eligible inmates to participate in the work release program or in the educational leave program, inter alia.

11. Inmates participating in the work release program are permitted to seek and maintain employment or to engage in on-the-job training, or to engage in other activities necessary to the furtherance of employment or training (such as seeking employment).

12. Inmates participating in the educational leave program may participate in education or vocational training programs, including attending college, or in other activities necessary to the furtherance of education or vocational training.

13. Under the statutory scheme, eligible inmates who so desire may apply for permission to participate in either the work or education release program to the Temporary Release Committee of the facility in which they are incarcerated.

14. If the Committee determines that it is consistent with the safety of the community and with the interests of the applicant, the Committee approves the recommendation and establishes a suitable program of temporary release for the applicant.

15. If the Committee's program for the applicant is further approved by the Superintendent of the facility and/or by defendant WARD, and the inmate is thereby accepted for work or education release, a memorandum of agreement is prepared by the Committee and signed by the inmate as a prerequisite to participation in the program.

16. The memorandum of agreement specifies the terms and conditions governing participation in the program. Under the statutory scheme, an inmate who violates the provisions of the memorandum of agreement is subject to removal from the program, arrest by a peace officer, the institution of disciplinary proceedings, and/or transfer to a more secure facility.

17. After an inmate has been admitted to the work or education release program, that inmate is assigned to a facility designated as a work release facility.

18. Correctional facilities operated by the New York State Department of Correctional Services are categorized as maximum, medium or minimum security institutions; all of the facilities designated as work release facilities are classified as minimum or medium security institutions in which the conditions of confinement are less rigorous than they are at maximum security facilities.

19. Participants in the work and education release programs are permitted to spend up to fourteen hours per day outside of their designated correctional facilities.

20. Participants in the work release program may travel on their own, without supervision, to and from their places of employment; may wear civilian clothing; may purchase their own lunches; may shop for personal items at stores within the bounds of confinement set forth in their memoranda of agreement; may associate with non-prisoners at their places of employment; and may obtain experience and training at their places of employment.

21. Participants in the work release program earn pay for their work at rates far exceeding the maximum pay allotted to inmates working within correctional facilities.

22. The earnings of a participant in the work release program are deposited in an account at the institution in which that inmate is confined, to be paid to the inmate upon his release, minus disbursements for costs relating to the inmate's participation in the work release program, for the support of the inmate's dependents, and for certain other costs.

23. Participants in the educational leave program may travel on their own, without supervision, to and from the educational institutions they are attending; may wear civilian clothing; may purchase their own lunches; may shop for personal items at stores within the bounds of confinement set forth in their memoranda of agreement; may associate with non-prisoners at the institutions they attend; and may work toward degrees at academic or vocational training institutions.

24. Participants in the educational leave program are eligible to receive student loans to pay for their education.

25. On information and belief, prior to August, 1977, it was the policy and practice of defendant WARD to allow any

inmate participating in the temporary release program to continue to participate in the program unless and until that inmate was found, at a hearing, to have violated one or more of the conditions imposed in the memorandum of agreement, an institutional rule, or a provision of the penal law.

AUGUST, 1977 - REVOCATIONS WITHOUT HEARINGS

26. Plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI and approximately 120 other members of the plaintiff class were summarily removed from the temporary release program on or about August 25, 1977.

27. Each of the 140 plaintiffs described in ¶26, supra, had applied for the temporary release program, according to the procedures outlines in ¶¶13-16, supra, and each had received approval from all necessary authorities.

28. Some of the named plaintiffs received such approval as early as September, 1976; others did not receive final approval until as late as July of 1977.

29. A number of the named plaintiffs and members of their class submitted numerous applications before receiving approval. Plaintiff ARNOLD applied for the temporary release program in August, 1976. He was advised by the Temporary Release Committee that he could reapply in May, 1977 if he maintained a good institutional record and showed evidence of a satisfactory adjustment. After having submitted six applications, and having fulfilled the conditions of the Committee, plaintiff ARNOLD received approval in May, 1977.

30. A number of the named plaintiffs and members of their class expended significant amounts of money from their personal funds in seeking employment or admission to educational institutions after being approved for participation in the temporary release program. Plaintiff ARNOLD spent approximately \$200 traveling from the Tappan Correctional Facility, in Ossining, New York, to New York City during a period of approximately three months before finding suitable employment.

31. Some of the named plaintiffs and members of their class, after being approved for the work release program, found employment, began work and maintained jobs for periods ranging up to approximately one year; other plaintiffs and members of their class had found employment and had worked for only brief periods of time. Plaintiff ARNOLD worked for only one day prior to his revocation from the program.

32. The plaintiffs and members of their class who were employed earned salaries ranging from approximately \$100 to approximately \$300 per week, for their work.

33. On information and belief, the performance of each plaintiff described in ¶26, supra, who was employed was satisfactory to that plaintiff's employer.

34. Some of the plaintiffs and members of their class, including plaintiff HOWARD, had found approved employment but had not yet begun work as of August 25, 1977.

35. Some of the plaintiffs and members of their class, including plaintiffs CEPEDA, HUNT and MOORE, were seeking employment and were scheduled for interviews with potential employers on or after August 25, 1977.

36. Some of the plaintiffs and members of their class were approved for educational leave and had gained admission to various educational institutions.

37. Some of the plaintiffs and members of their class were scheduled to begin college courses in September, 1977, including plaintiff COLEMAN, who was admitted to the New York City Community College as a student in the Environmental Control Technology Program, plaintiff OAKLEY, who was admitted to Bernard Baruch College, and plaintiff REED, who was admitted to Fordham College.

38. All of the plaintiffs and the members of their class who were participating in the work and education release program were able to enjoy the benefits described in ¶18-24, supra.

39. On or about August 25, 1977, plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI, were transferred from the minimum or medium security work release facilities where they had been residing to the Ossining Correctional Facility [hereinafter "Ossining"], a maximum security correctional facility.

40. On information and belief, on or about August 25, 1977, all or most of 120 other members of the plaintiff class described in ¶26, supra, were transferred from the minimum or medium security work release facilities where they had been residing to Ossining or to other maximum security correctional facilities under the control of the New York State Department of Correctional Services.

41. On information and belief, each plaintiff removed from the work release program is subject to further transfer to maximum security facilities within the control of the New York State Department of Correctional Services.

42. Plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI, were not given written notification of any reason why they were being removed from the temporary release program.

43. On information and belief, none of the approximately 120 members of the plaintiff class who suffered revocation on or about August 25, 1977 was given written notification of any reason for their removal from the program.

44. On information and belief, plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI, and the members of the class described in ¶26 supra, were not removed from the temporary release program as a result of any finding of misbehavior arising during their participation in the program. Neither was any of these plaintiffs given notice of any charge of misbehavior that might result in removal from the program.

45. Prior to their removal from the program on or about August 25, 1977, plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI were not afforded any hearing at which the facts pertaining to their participation in the temporary release program were adduced.

46. On information and belief, none of the members of the plaintiff class described in ¶26, supra, was afforded a hearing prior to being removed from the temporary release program on or about August 25, 1977.

47. As a result of removal from the work and education release programs, plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI, and the members of the plaintiff class described in ¶26, supra, have suffered and continue to suffer loss of opportunities for vocational or educational training and experience, and other forms of liberty and property.

PLAINTIFF TRACY - REVOCATION PRIOR TO AUGUST, 1977

48. Plaintiff TRACY has been in the custody of the New York State Department of Correctional Services since January, 1974. On or about March 13, 1976, having been approved for participation in the temporary release program by the process outlined in ¶¶13-16, supra, plaintiff TRACY was transferred from the Wallkill Correctional Facility, a medium security institution, to the Bayview Correctional Facility [hereinafter "Bayview"], a minimum security work release facility located in New York, New York.

49. While at Bayview, plaintiff TRACY was employed at the Harlem Variety Store, pursuant to a memorandum of agreement, as described in ¶¶15-16, supra, from approximately November 2, 1976 until approximately December 12, 1976. Plaintiff TRACY received take-home pay of approximately \$77 per week, all of which was to be placed in plaintiff's account for disbursement to plaintiff as described in ¶22, supra.

50. Under the terms of plaintiff's memorandum of agreement, he was permitted to be off the premises of Bayview for eleven hours per day; to travel on his own, in civilian clothing, to and from his place of employment, and enjoyed the benefits described in ¶18-22, supra.

51. On or about December 15, 1976, plaintiff TRACY was called before the Adjustment Committee to answer charges of being late in returning to Bayview after work on several occasions. He was ordered confined to the facility, and the matter was referred to the Temporary Release Committee.

52. On or about December 22, 1976, Correction Officer Jose Velez, an employee of the New York State Department of Correctional Services employed at Bayview, delivered to plaintiff a copy of formal charges, which alleged that plaintiff had failed to comply with his memorandum of agreement by, (a) turning in cash instead of paychecks; (b) being "outside the bonds of confinement" (i.e., not at work) from November 8 through December 12, 1976; (c) misusing his memorandum of agreement and failing to inform his parole officer that he had lost his job; (d) lying to the staff; and (e) returning late from his job on several occasions.

53. On information and belief, charges (b), (c) and (d) resulted from a discussion between Parole Office Goergan and Mr. Crooks, an employee of the Harlem Variety Store, during which Mr. Crooks stated that plaintiff TRACY had not been working at the store from November 8 through December 12.

54. Plaintiff asked correction officer Velez to assist him in defending against the charges listed in ¶52, supra, by contacting the night manager of the Harlem Variety Store,

Mr. Ike, whom plaintiff asserted would verify that plaintiff had been working at the store during the period in question, and who also would verify that plaintiff had been paid in cash rather than by check.

55. Although correction officer Jose Velez had been designated as plaintiff's employee assistant pursuant to Title 7 of the New York Code of Rules and Regulations §253.3, correction officer Velez advised plaintiff that he would not undertake any investigation on plaintiff's behalf.

56. Plaintiff requested correction officer Velez to find an attorney to assist him in preparing a defense against the charges but, on information and belief, Velez did not do so.

57. On December 27, 1976, a Superintendent's Proceeding, conducted by defendant SPERBECK, was held at Bayview to resolve the charges against plaintiff.

58. At this proceeding, plaintiff admitted having been late in returning from work on a number of occasions and defendant SPERBECK thereupon found plaintiff guilty of excessive lateness and imposed a punishment on plaintiff by assessing sixty days of good behavior allowance.

59. At the proceeding, plaintiff TRACY also explained that the source of the charges against him, Mr. Crooks, would not have known whether or not plaintiff was working at the Harlem Variety Store because Mr. Crooks was only present in the store at night, and plaintiff worked during the day. Plaintiff explained that he had been at work during the period in question and asked that Mr. Ike be contacted to verify his employment. Plaintiff also requested that the institutional chaplain, Reverend Downing, who had spoken to

Mr. Ike at plaintiff's request, be called upon to verify plaintiff's explanation.

60. After rescinding the lateness charges, defendant SPERBECK stated that he would adjourn the hearing until he could "check with Reverend Downing" and other officers.

61. On December 29, the hearing resumed, but defendant SPERBECK had not spoken with Reverend Downing or with Mr. Ike.

62. Plaintiff again requested the opportunity to rebut the charges against him through Reverend Downing or Mr. Ike.

63. Defendant SPERBECK found plaintiff guilty of all of the charges set forth in ¶52, supra, and ordered that plaintiff be transferred to a "more structured facility," specifying that this recommendation was a result of his finding that plaintiff was guilty of having been outside the bounds of confinement (i.e., not at work) for over a month, failing to turn in paychecks, and misusing the memorandum of agreement.

64. Upon information and belief, defendant SPERBECK never contacted or attempted to contact Mr. Ike, or any other employee of the Harlem Variety Store.

65. Neither parole Officer Goergan nor Reverend Downing, nor Mr. Ike was present at the proceeding of December 27 or the proceeding of December 29.

66. Plaintiff TRACY did not have the assistance of counsel or counsel-substitute at the proceeding of December 27 or December 29, or before either of these proceedings.

67. In or about January, 1977, plaintiff was transferred to the Auburn Correctional Facility ("Auburn"), a

maximum security institution located at Auburn, New York, where he remains incarcerated.

68. At Auburn, plaintiff is employed within the prison as wing waiter, and receives pay of \$4.80 biweekly.

69. Plaintiffs TRACY, ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI, and all members of the plaintiff class who are or have been participating in the temporary release program, have a reasonable expectation of maintaining their status as participants in the temporary release program until and unless they are found, pursuant to a hearing consistent with the requirements of due process, to have violated one or more of the conditions imposed in their memorandum of agreement, one or more institutional rules, or one or more provisions of the penal law.

70. On information and belief, at temporary release revocation hearings such as were held prior to August, 1977, it is the policy and practice of defendants to refuse to allow inmates the right to call witnesses.

71. On information and belief, it is the general policy and practice of defendants not to permit inmates at such temporary release revocation hearings to confront or cross-examine the persons who have charged them with misbehavior.

72. On information and belief, it is the general policy and practice of defendants not to permit inmates at such hearings the right to be assisted by counsel or counsel-substitute.

73. Defendants' general policies and practices, as alleged in ¶170-72, supra, rendered plaintiff TRACY, and have rendered and will render numerous other members of the plaintiff class, unable to present a meaningful defense to charges brought against them at temporary release revocation hearings, thereby causing these plaintiffs to suffer a grievous loss of liberty and property.

74. Defendants' actions in removing plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI, and those members of the plaintiff class described in ¶26, supra, from the temporary release program, without affording those plaintiffs any opportunity to present a defense or to adduce the facts relevant to their participation in the temporary release program, caused these plaintiffs to suffer a grievous loss of liberty and property.

CLAIMS FOR RELIEF

75. By their actions described herein, defendants have violated the rights of plaintiffs and the class they represent under the Fourteenth Amendment to the Constitution of the United States.

76. By failing to afford a hearing to plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI, and the other members of the class described in ¶26, supra, prior to revoking the temporary release status of these plaintiffs, defendants have deprived these plaintiffs and members of their

class of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

77. By failing to allow plaintiff TRACY and members of his class the right to assistance of counsel or counsel-substitute, the right to call witnesses, the right to confront and cross-examine witnesses and the right to present a meaningful defense to charges of misconduct at hearings held prior to revoking temporary release status, defendants have deprived plaintiff and members of his class of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

78. By failing to afford plaintiff TRACY a choice of employees to assist him at the Superintendent's Proceedings held against him, and by failing to provide plaintiff TRACY with adequate assistance in preparing a defense to the charges against him, defendants have violated the rights of plaintiff TRACY under Title 7 of the New York Code of Rules and Regulations §253.

WHEREFORE, plaintiffs pray that this Court:

I. Adjudge and declare that the procedures and actions hereinabove described are in violation of the rights of plaintiffs and their class under the Constitution and laws of the United States and of the State of New York.

II. Enjoin defendant WARD from revoking the temporary release status of any member of the plaintiff class without holding a prior hearing at which the members of the plaintiff class are guaranteed timely written notice of grounds for revocation, the right to assistance of counsel or counsel-

substitute, the right to call witnesses, the right to confront and cross-examine adverse witnesses, the right to present a meaningful defense, and/or mitigating evidence, and the right to a statement of the facts found, and the evidence relied on and reasons for the disposition.

III. Enjoin defendant WARD to order that the named plaintiffs and any other member of the class who so desires, be reinstated to temporary release status and transferred to an institution designated as a work release facility.

IV. Enjoin defendant WARD to order the disposition of the Superintendent's Proceeding held against plaintiff TRACY to be fully expunged.

V. Enjoin defendant WARD to order fully expunged any reference to the August, 1977 revocation of the temporary release status of plaintiffs ADAMS, ARNOLD, BETSCH, CEPEDA, COLEMAN, GONZALEZ, HOWARD, HUNT, LITTLE, MOORE, OAKLEY, ORDINE, PLEASANT, REED, REPETTI, ROBINSON, RODRIGUEZ, SOARES, THOMAS and TURRISI, and the members of their class described in 126, supra.

VI. Enter judgment against defendants jointly and severally, awarding each plaintiff actual, compensatory and punitive damages.

VII. Award plaintiffs the costs and disbursements of this action, including the reasonable expenses of plaintiffs' attorneys.

VIII. Grant such other and additional relief as
the Court may deem just and proper.

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
JAMES TRACY, et al., :
Plaintiffs, :
-against- : AFFIDAVIT
DOMINICK SALAMACK, et al., : 77 Civ. 3937
Defendants. : (MEL)
-----X

STATE OF NEW YORK)
 : SS.:
COUNTY OF ALBANY)

Lewis L. Douglass being duly sworn, deposes and says:

At a conference in Judge Lasker's chambers on Monday,
September 26, 1977 Judge Lasker requested clarification of the
following points:

- 1) Number of inmates removed from temporary release pro-
grams who were enrolled in college and the names of such inmates;
- 2) Number and name of inmates removed from temporary
release programs who had been granted ODOP status or straight
parole dates by the Board of Parole;
- 3) Further explanation of the screening procedure used
in determining which inmates were to be removed from temporary
release programs and a summary description of the characterization
of those inmates removed;
- 4) An explanation of the manner in which removed inmates
had previously been advised that participation in the temporary
release program is a privilege and may be revoked at any time.

This affidavit also a discussion of administra-
tive concerns which will ensue the event that the court orders
individual hearings on temporary release program removals.

I. Inmates Removed - College Enrolees

Three inmates were removed from temporary release programs who were either enrolled in college programs or who had been accepted and scheduled to begin college in September, 1977. These three are:

Roderick Watley - 75-A-3061 - removed from Lincoln Correctional Facility. This inmate had a prior escape conviction and, therefore, on September 2, 1977 would have been or now is statutorily ineligible. Bobby Porter - 74-B-1070 - removed from Tappan Correctional Facility. Inmate was removed on the basis of his continuing pattern of robbery convictions, the latest of which was committed while under parole supervision. Gregory Joyner - IIS 1364973 H - Inmate was removed from program because he had a court imposed minimum of 9-27-78 which was more than one year away at the time therefore rendering him ineligible under Section 351(2) of the Correction Law as amended. Mr. Joyner will be approved if he reapplies or is approved by local temporary release and the superintendent as required by Section 855.

II. Inmates Removed - Sixty Days or Less to Parole Appearance

Twenty-two inmates were removed from temporary release programs who were within sixty days of their next scheduled appearance before the Parole Board. Two of these cases had prior escape convictions and are, therefore, ineligible for temporary release participation pursuant to Section 851(2) as amended. The remaining twenty were removed because in the judgment of those who reviewed their case histories they would ^{not} be recommended for Commissioner's approval since their continued participation in the program would constitute a threat to the safety of the community. Case summary of the twenty-two are attached for the court's information.

II B. Inmates Removed - Sixty Days to Conditional Release

One inmate was removed from a temporary release program who was within 60 days of a conditional release date. A summary description of this case is attached for the court's information.

II C. Inmates Removed - ODOP or Straight Date Parole Status

Five inmates were removed from temporary release program participation who were in ODOP status or who had Straight Parole Dates. One of these cases is also included in the removals described in Section II A above. Of these five cases, two had prior escape convictions and are therefore ineligible pursuant to Section 851(2) as amended. The remaining inmates were removed because it was determined that their continued presence in a temporary release program would constitute a threat to the safety of the community.

III. Screening Procedure and Characterization of Inmates Removed

The criteria used to evaluate the temporary release program participants during this special screening process were the same as those to be utilized after September 1, 1977. Specifically, each inmate was scored utilizing the Vera Point Selection and was also submitted to a three member panel chaired by a member of the executive staff for scrutiny in accordance with the expressed Legislative Mandate. In addition, recommendations were received from the superintendents of each facility concerning work and educational release inmates at that facility and these were combined with the Central Office review in order to make a final determination.

In the Central Office review process, the Vera Point Selection system was used as a decision-making tool but was not the sole and exclusive determinant. Inmates scoring below 35 points in this system were generally viewed as poor risks for temporary release participation and inmates scoring above 35 points were deemed to be serious candidates for temporary release participation although a score of 35 points or more did not create an entitlement to temporary release participation.

Of the 89 inmates removed from the temporary release program on August 25, 1977 in New York City and Tappan, 35 scored below 35 points and were therefore ineligible by Departmental standards. The remaining 53 scored above 35 points and 1 was a youthful offender and unscorable, but it was the view of the Department that they be removed from temporary release programs because their prior pattern of serious criminality, the serious nature of the instant offense, their history of behavior in an institutional or filed supervision setting, or a combination of these factors suggested that their continued participation in temporary release programs would run counter to the Legislative Mandate as expressed in the amendment to the Correction Law.

For the court's information brief descriptions of each inmate removed from the program are attached.

IV. Prior Notification to Inmates

Each of the inmates who were removed from the temporary release program had, prior to entering the program signed a memorandum agreeing to be bound by all the terms and conditions of the program. Each of these memoranda contained the following statement: "I understand that my participation in the program is a privilege which may be revoked at any time." Sample copies of these memoranda are attached for the court's information.

V. Administrative Concerns if the Court Should Require Hearings on Each Case

It is the contention of the Department that if the court were to require hearings on each individual removed from the temporary release program, it would seriously impair this Department's ability to administer such program in a manner consistent with State law and responsive to the safety of the community and the welfare of the inmate. Section 853 of the Correction Law amended to become Section 855 on September 1, 1977 provides that the superintendent of the institution may, at any time and upon recommendations of the Temporary Release Committee or of the Commissioner or the Chairman of the State Board of Parole or his designee, shall

revoke any inmate's privilege to participate in a program of temporary release. This provision is predicated on the belief that it is necessary for the Department to be able to take forthwith action when facts and circumstances suggest that the continued participation of any inmate in temporary release endangers the safety of the community.

If the court were to require hearings on the removal of each inmate, this would interfere with the Department's ability to take such forthwith action. Furthermore, it could conceivably create a situation wherein the Commissioner, once having personally approved an inmate to participate in temporary release may not rescind such personal approval. Any diminution of his ability to rescind such personal approval would likely result in a reluctance on the Commissioner's part to permit such inmate to enter into the program and would reduce to but a handful the number of inmates permitted to participate in temporary release programs.

L. J. H.

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

On this 29th day of September, 1977, before me personally came Lewis L. Douglass, to me known, who being duly sworn, did depose and say that he is the Executive Deputy Commissioner of the New York State Department of Correctional Services and he did execute the foregoing instrument.

Bruce W. Baker
Notary Public

BRUCE W. BAKER
Notary Public, State of New York
Residing in Rensselaer County
Commission Expires March 14, 1978

#SIS 1225

Attachments - Section IV

LINCOLN CORRECTIONAL FACILITY
SPECIAL PASS
31 West 110th Street
New York, New York 10026
Phone: 860-9400-01

INSTRUCTIONS
Client prepares form in duplicate for Parole/Counselor approval. P/C keeps working copy; places original in Master Control box to be transmitted to Processing. Clients whose contract does not permit exit will be permitted out of L.C.F. only if there is an approved work-search special pass and an identity card

TO: _____ DATE: _____
Parole/Counselor
FROM: _____ L.I.P.: _____
Resident

I am requesting a TEMPORARY RELEASE PROGRAM pass from _____ A.M. to _____ P.M. on _____ Date to seek a suitable parole program.

FROM	TO	ADDRESS	APPT. TIME
1. LINCOLN C.F.			
2. _____			

I accept the foregoing program and agree to be bound by the Terms & Conditions thereof. I understand that I will be under the Supervision of the State Dept. of Correctional Services while I am away from the premises of the Institution and I agree to comply with the instructions of any parole officer or other employee of the department assigned to supervise me. I understand that my participation in the program is a privilege which may be revoked at any time and that if I violate any provision of the program I may be taken into custody by any peace officer and I will be subject to disciplinary procedures. I further understand that if I intentionally fail to return to the Institution at or before the time specified in the memorandum I may be found guilty of a felony.

FUNDS REQUESTED (Check one) ☒ YES ☐ NO

APPROVAL SIGNATURE TITLE
I acknowledge receipt of \$ _____ from the Processing Officer for program development expenses and authorize the withdrawal of job-seeking funds from my account.

Resident's Signature
RESULTS OF ABOVE: (e.g., completed visit, problems, got job; type of job, etc.)

1. _____
2. _____

cc/ 1) Staff working copy
2) Processing area (Capt.)
(On client's departure, this copy of pass request to be returned to Sr. P.C.'s secretary's office by 11 AM to be distributed to initiator who will record results and send it to the clerk's office for filing.

Parole/Counselor

DATE

STATE OF NEW YORK - DEPARTMENT OF CORRECTIONAL SERVICES
LINCOLN CORRECTIONAL FACILITY

TO: _____
(NAME) DEPT. NUMBER FAC. NUMBER

As authorized by Article 26 of the Correction Law (Temporary Release Program for State Correctional Institutional), you are hereby granted a _____ Release Program from Lincoln C.F. effective _____ as follows:

(NAME/ADDRESS/CITY/STATE/TELEPHONE NUMBER OF EMPLOYEE OR EDUCATION TRAINING FACILITY)

DAYS: _____ Release at _____ Return to _____

You will travel to and from your place of employment or training each program day by the shortest usually traveled route. For transportation you will use _____. If transported by a State vehicle, you will be at the pickup spot upon completion of the approved program day located at _____ by _____. If you experience any difficulty or need help while away from the facility, call the facility at (212) 860-9400 or the area Parole Officer at the following telephone number _____.

SPECIAL INSTRUCTIONS: _____

SUPERINTENDENT DATE

CHAIRMAN, Temporary Release Committee DATE

MEMBER, Temporary Release Committee DATE

MEMBER, Temporary Release Committee DATE

I accept the foregoing program and agree to be bound by the Terms & Conditions thereof. I understand that I will be under the Supervision of the State Dept. of Correctional Services while I am away from the premises of the Institution and I agree to comply with the instructions of any parole officer or other employee of the department assigned to supervise me. I understand that my participation in the program is a privilege which may be revoked at any time and that if I violate any provision of the program I may be taken into custody by any peace officer and I will be subject to disciplinary procedures. I further understand that if I intentionally fail to return to the institution at or before the time specified in the memorandum I may be found guilty of a felony.

INMATE'S SIGNATURE DATE

WITNESS DATE

Original - Folder
cc/ Resident
Facility Files (Sup't.)
Parole Folder
Processing Area
SPC

~~65~~ 65

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
Edgecombe Correctional Facility
611 Edgecombe Avenue
New York, New York 10032
Phone #: (212) 923-2575

TEMPORARY RELEASE AUTHORIZATION & CONTRACT
(To be issued to the client upon approval
of the contract)

TO: _____
(Client's Name)

ED#

DEPT#

NYSID#

As authorized by Article 26 of the Correctional Law, you are hereby granted a Temporary Release Furlough from Edgecombe Correctional Facility for the purpose of Employment or Training, Family and Community Ties. You will be released temporarily on:

WORK, SCHOOL &/OR TRAINING INFORMATION

(Check applicable Boxes)

WORK DAYS: Mon ☐ Tues ☐ Wed ☐ Thurs ☐ Fri ☐
Sat ☐ Sun ☐

ACTUAL WORK HOURS: From _____ AM ☐ PM ☐ To _____ AM ☐ PM ☐

FURLOUGH HOURS: From _____ AM ☐ PM ☐ To _____ AM ☐ PM ☐

EMPLOYER OR SCHOOL: _____

ADDRESS: _____

SUPERVISOR'S

NAME: _____ PHONE# _____

FURLOUGH

ADDRESS C/O: _____

PROGRAM INFORMATION

JOB TITLE: _____

PAY DAY: _____

DATE FIRST PAID: _____

SALARY: _____ CASH ☐ CHECK ☐

PAID: WEEKLY ☐ BI-WEEKLY ☐ MONTHLY ☐

WEEKLY BUDGET: _____

PROGRAM: W/R ☐ S/R ☐ TRNG ☐

EFFECTIVE DATE, THIS CONTRACT: _____

PAROLE/COUNSELOR: _____

WEEKEND FURLOUGH INFO.

Weekend Furloughs when authorized and for days approved from Saturday morning to:

RETURN (Circle Day of Return)
SUNDAY: 8:30 PM ☐ 9:30 PM ☐
10:00 PM ☐

MONDAY: _____
(Specify)

OTHER: _____
(Specify)

(Relationship)

Apt# _____

(Phone#)

AGREEMENT

You will travel by the most direct Public Transportation to the above approved destinations and will advise your Parole Officer of his Supervisor of any difficulties or need to change either the travel conditions or destination by calling 923-2575 (keep a record of the person you speak with when you call). TAMPERING WITH FORM INVALIDATES THIS CONTRACT.

I have signed a statement accepting the conditions of Temporary Release and the above program which I helped develop and agree to be bound by the terms and conditions thereof. I will carry a copy of this Authorization/Contract on my person at all times when I am away from the premises of this facility on Work, Educational or Family Tie Furloughs and will exhibit it to any Peace Officer upon his request. I will turn in all salary checks and other income to the Processing Officer for credit to my Inmate Account.

INMATE SIGNATURE _____ DATE _____

WITNESS _____ DATE _____
(Parole Officer/Counselor)

APPROVED BY _____ DATE _____
(P.O. Supervisor)

APPROVED

SUPERINTENDENT _____ DATE _____

CHAIRMAN - TRP _____ DATE _____

TRP COMMITTEE MEMBER _____ DATE _____

TRP COMMITTEE MEMBER _____ DATE _____

Rev. 6/77 cc: Client (Upon approval of Contract) 3) Parole Folder

DEPT. OF CORRECTIONAL SERVICES
FISHKILL CORRECTIONAL FACILITY

Work Release/Study Release Agreement

I understand that I have been approved for participation in a Work Release/Study Release Program. As a participant, I promise, with full knowledge that failure to keep such a promise may result in my removal from the program, to keep all the conditions specified on this sheet and all others (conditions & instructions) given to me by the Temporary Release Committee or any other representative of the Department of Correctional Services.

- RULE 1 Upon release from the Fishkill Corr. Facility for participation in my approved program, I will go to the location of that program and will conform to my bounds of confinement as outlined by my Parole Officer.
- RULE 2 At the end of my approved work day, I will return to the Fishkill Corr. Facility again conforming to my specified bounds of confinement.
- RULE 3 If I am transported to or from my approved program by a State vehicle, I will be at my assigned pick-up point at the specified times.
- RULE 4 a) I will notify my Parole Officer or the Correction Officer Supervisor of any changes in my work or study assignments. b) If, for any reason, I lose my employment I will immediately notify my Parole Officer or the Correction Officer Supervisor. c) I will not voluntarily quit my approved program without prior approval of my Parole Officer. d) I understand that if I am employed and I precipitate my own dismissal I will be in violation of my Work Release/Study Release Agreement.
- RULE 5 a) I promise that I will turn over to the Corr. Officer on duty all monies received from earnings or from any outside source. I understand that I will receive a receipt for such monies. I further understand that such monies will be disbursed by the institution according to established procedures and that I will receive monthly itemized statements for such disbursements. b) I understand that if transportation is provided by a State vehicle, I will be charged for such transportation. I give my approval for such transportation charge to be charged to my account.
- RULE 6 a) I promise to abide by all of the rules of the Fishkill Corr. Facility. b) I will lead a law abiding life and conduct myself as a good & responsible citizen. c) I promise that my behavior will not be a menace to the safety or well-being of myself, of others, or of society. d) I will immediately advise my Parole Officer, Correction Counselor or Correction Supervisor of any time that I am questioned or arrested by members of any law enforcement agency. e) I understand that I am legally in the custody of the Dept. of Correctional Services, and that my person or any property under my control may be searched by my Parole Officer or by any other representative of the Dept. of Correctional Services.
- RULE 7 I will not obtain, possess or use a credit card without specific written permission. If I currently have such a card, I will notify my Parole Officer. I will not go into debt, borrow money or purchase any items on credit, including lay-away without specific written approval.
- RULE 8 a) I will comply with the instructions given to me by my Parole Officer, Correction Counselor, Correction Officer or any other representative of the Dept. of Correctional Services. b) I understand that making false reports to my Parole Officer, Correction Counselor, Correction Officer or any representative of the Dept. of Correctional Services may be considered a violation of my Work Release/Study Release Agreement.
- RULE 9 a) I will not obtain a driver's license without specific written approval. If I currently have such a license, I will immediately notify my Parole Officer and turn the license over to him. b) I will not purchase, rent or borrow a motor vehicle without specific written approval. c) I will report any accident in which I may become involved regardless of whether or not the police were notified.
- RULE 10 I will not use, possess or purchase any illegal drugs or use or possess those drugs that have been unlawfully obtained.

EFFECTIVE 7-23-77

MCN:vab

DATE: 7-22-77

STATE OF NEW YORK - DEPT. OF CORRECTIONAL SERVICES

FISHKILL CORRECTIONAL FACILITY

Work Release/Study Release Agreement
Bounds of Confinement

I understand that I have been approved for participation in a Work Release - Study Release program. As a participant, I promise, with full knowledge that failure to keep such a promise may result in my removal from the program, to keep all the conditions specified on this sheet and all others (conditions & instructions given to me by the Temporary Release Committee or any other representative of the Department of Correctional Services.

I understand that my program is with the Triple E Ind.

located at Rte. 9, Hesperia, N.Y.. My program hours will be from 7 am to 3:30 pm. I will leave the Fishkill Correctional Facility no earlier than 5:30 am and will return no later than 7:15 pm. If transportation is pro-

vided by a state vehicle, I will be at my pick up spot located at Fishkill CF.

Search Room at 3:20 am. Upon completion of my and Yankee Clipper Diner at 5:20 am approved program day, I will be at my pick up spot located at Shortline Bus Terminal, Broadway, Newburgh, NY at 6:30 pm.

say

I understand that I will be given time each day during which I may purchase meals, food, clothing or other such approved items. The purchase of such items must take place within the limits of my bounds of confinement. These are:

AM - ~~Yankee~~ Yankee Clipper Diner, Beacon, ONLY

PM - Broadway in Newburgh NY from West St. to Rte. 9W

I understand that if I fail to return to the Fishkill Correctional Facility, as required, I may be declared an absconder. I further understand that I may be prosecuted for absconding and if convicted may be required to serve an additional sentence.

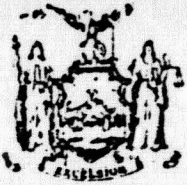
PETER ASENCIO
WR704

Signature: _____
Date: _____

Witness: _____

Form WR 2A (9-74)

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DEPARTMENT OF CORRECTIONAL SERVICES

GOV. A.E. SMITH
STATE OFFICE BUILDING
P.O. BOX 7033
ALBANY, N.Y. 12225

RUSSELL G. OSWALD
COMMISSIONER

June 22, 1972

ADMINISTRATIVE BULLETIN #12 AMENDED

TO: SUPERINTENDENTS OF CORRECTIONAL FACILITIES, DIRECTORS OF STATE HOSPITALS, CENTRAL OFFICE GROUP HEADS AND DIVISION HEADS, AND DIRECTORS AND SUPERVISORS OF PAROLE FIELD AND INSTITUTION OFFICES

FROM: RUSSELL G. OSWALD - COMMISSIONER *Russell G. Oswald*

RE: POLICIES AND PROCEDURES GOVERNING THE WORK RELEASE PROGRAM AUTHORIZED BY CHAPTER 472, LAWS OF 1969, ARTICLE 26, TEMPORARY RELEASE PROGRAMS FOR STATE CORRECTIONAL INSTITUTIONS

Administrative Bulletin #12 is hereby amended. This Bulletin, therefore, cancels or supersedes the following Departmental directives:

1. Central Office directive of December 1, 1969, "Rules and Regulations Governing the Work Release Program."
2. Administrative Bulletin #12 dated July 30, 1971.

Consistent with the goal of public protection, primary objectives of the work release program are to provide selected inmates with the opportunity to benefit from the range of education, training, employment or volunteer work resources in the community and to provide opportunity for these inmates to demonstrate or develop acceptable behavior patterns as preparation for their future re-entry into the community. Through the work release program, correctional and welfare costs may be reduced and community and citizen participation in the correctional process is realized.

The provisions of Article 26 of the Correction Law and the policies and procedures consistent therewith and specified herein shall govern the operation of the work release program.

The Director of Community Placement, under the general direction of the Deputy Commissioner for Parole and Community Services, shall be responsible for the implementation and administration of the work release program in the Department of Correctional Services. Designated Parole Officer staff shall assume primary responsibility for securing the entire range of education, training, volunteer work and employment opportunities for inmates selected for work release. Parole Officer staff shall also assume the responsibility for supervising inmates during their participation in temporary release programs outside the premises of institutions.

Following consultation with each Superintendent regarding the feasibility of a work release program, the Director of Community Placement shall report recommendations to the Commissioner and the Commissioner shall designate establishment of the work release program at appropriate facilities.

Based on designation of the establishment of the work release program, the Superintendent shall nominate for the Commissioner's approval a Temporary Release Committee consisting of three staff members, one of whom shall be designated to serve as Chairman and as the local coordinator of the program. The responsibilities of the Temporary Release Committee shall include the following:

1. Communicating with the inmate population in connection with program requirements and procedure for applying for participation.
2. Scheduling of regular Committee meetings for the purpose of selecting inmates for the program.
3. Reporting to the Director of Community Placement on each Committee meeting listing each inmate applicant and the decision of the Committee.
4. Notifying each inmate applicant of outcome and follow-up interview when required.
5. Supervising clerical support staff assigned to the program.
6. Maintaining individual case records to evaluate the progress made by the inmate, maintaining records of inmate earnings and expenditures and preparing statistical summaries and other reports as required.

In addition, the facility Temporary Release Committee may establish a statement covering guidelines required for effective program operation at the particular facility. Such statement of guidelines, however, must be approved by the Superintendent and the Commissioner.

Selection for the work release program shall require the unanimous agreement of the Committee and approval of the Superintendent. Selection shall be based on the application of the following criteria:

1. The applicant must be an "eligible inmate." More specifically, the applicant must be eligible for release on parole or will become eligible for release on parole within one year. In the case of a person serving an indeterminate sentence of imprisonment imposed pursuant to the Penal Law in effect after September 1, 1967, parole eligibility shall be upon the expiration of the minimum period of imprisonment fixed by the Court or where the Court has not fixed any period, after service of the minimum period fixed by the Board of Parole. An inmate, therefore, becomes eligible for participation in work release one year before the expiration of the minimum sentence fixed by the Court or one year before expiration of the minimum period fixed by the Parole Board. For example, if an inmate appears before the Parole Board for MPI determination and the Board fixes the minimum sentence at thirty months, having served ten months prior to MPI appearance, the inmate would be required to serve an additional eight months at which time he would become eligible for work release participation.

2. Inmate must be in suitable health as determined by medical examination for performance of the activity required by the work release program.

3. Inmate must be capable of profiting from participation in the work release program as to further the development of constructive work habits and skills.

4. Inmate must be suitable for participation in work release, taking into consideration the potential benefits he may gain and the safety of the community.

In operation of work release, the following rules shall apply:

1. The facility physician shall provide medical clearance for all individuals selected or tentatively selected.

2. Inmates assigned to work release shall be housed together insofar as practical.

3. All inmates are to pass through a central clearance room in which they are to leave their prison clothing, be searched, don work clothing, and reverse the process upon their return to the facility.

4. With the approval of the local coordinator, inmate participants may be permitted to leave the facility for the purpose of an interview if requested by a prospective employer or community training facility.

5. Shopping activity in the outside community necessary to satisfy needs that arise as a result of program participation shall be permitted in accordance with the following guidelines:

- a) In preparation for starting in an approved work release program, inmates may shop in the nearby community for necessary work clothing or other items, escorted by a Correction Officer or other staff member;
- b) While enroute to places of employment or training, or during the return to the facility, a work release participant may shop at stores within "extended bounds of confinement" for incidental needs which may arise on a day-to-day basis. The shopping must not interfere with established work hours or expected time of return to the facility;
- c) With written permission of the local coordinator, a participant may be permitted to engage in necessary shopping on the return route to the facility which requires a later than usual arrival at the facility as long as the extension of time does not unduly disrupt facility operations and is within the maximum fourteen hour period of time that the individual may be away from the facility;

d) With written permission from the coordinator, a participant may be permitted to leave the facility on a Saturday to shop in the nearby community for necessary items between the hours of 9 a.m. to 2 p.m. The actual time permitted will depend on the shopping needs of the participant and the location of the shopping area.

6. Working hours and departure and arrival schedules will govern arrangements for meals for this group. Arrangements for carrying these inmates on the daily count will be made by the Deputy Superintendent.

7. Program participants shall be permitted the same sick call privileges for medical and dental attention as other inmates.

8. Visits for inmates participating in the work release program shall be restricted to their non-working days.

9. The earnings of an inmate shall be turned over to the head of the facility who shall deposit such salary as inmate's funds. Disbursements are authorized only for the purposes stated in the Statute.

10. The Temporary Release Committee shall obtain the inmate's participation in planning the disposition of earnings and to include "savings" as related to the eventual release plan.

11. Money advanced to an inmate with a paid employment program for purchasing of work clothing, tools, carfare or for other expenses connected with the program, will be repaid by the inmate in accordance with a schedule determined by the Committee.

12. To provide for necessary daily cash amounts, small locked boxes may be provided for which only the inmate shall hold the key. Duplicate keys shall be kept in sealed envelopes elsewhere, and can only be used to open a box in the presence of the inmate or as directed by the Superintendent. Suitable amounts of the daily cash needed shall be determined by the Temporary Release Committee on an individual basis.

13. Inmate must agree to abide by work release program terms and conditions (Section 853.6, 854 and 857).

14. Removal of an inmate from the work release program and other disciplinary actions shall be consistent with the provisions of Section 853.8, 854.3 and 854.4 of Article 26 of the Correction Law. The decision to terminate an inmate's participation in a work release program shall only be taken after a prompt and fair hearing conducted by the Temporary Release Committee.

All personnel and inmates shall be informed of the policies and procedure governing the work release program.



STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES

THE STATE OFFICE BUILDING CAMPUS

ALBANY, N.Y. 12243

EDWARD ELWIN
DEPUTY COMMISSIONER
PAROLE AND COMMUNITY
SERVICES

JAMIN WARD
COMMISSIONER

MEMORANDUM

TO: Thomas Dean, TRC Chairman, Mt. McGregor
FROM: Edward Elwin, Deputy Commissioner
RE: Special Review Case
DATE: February 10, 1977

Special review case listed below has been reviewed and approved for participation in the temporary release program requested.

INMATE AND NUMBER

BUCKHANON, CHARLES

76-D-90

Work Release, Fishkill

WA:jc

cc: Inmate

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 -----x

4 JAMES TRACY, et al., :

5 Plaintiffs, :

6 -against- : 77 Civ. 3937

7 DOMINICK SALAMACK, et al., :

8 Defendants. :

9 -----x

10

11 New York, New York
12 October 6, 1977 - 4:45 p.m.

13

14 BEFORE: HON. MORRIS E. LASKER,

15 District Judge

16

17

18 APPEARANCES:

19

PRISONERS' LEGAL SERVICES

20

Attorneys for Plaintiffs

21

BY: SUSAN N. HERMAN, ESQ.,

22

PIERCE GLETTY, ESQ., Of Counsel

23

LOUIS J. LEFKOWITZ, ESQ.,

24

Attorney General, State of New York

25

Attorneys for Defendants

26

BY: KEVIN MCKAY, ESQ.,

27

Assistant Attorney General

28

ALSO PRESENT:

29

LEWIS DOUGLASS, Deputy Commissioner of Correctional
Services

30

MARTIN HORN, Director of Temporary Release Program

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VAUGHAN FINN, ESQ.

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2 THE COURT: Have we got the most recent papers?

3 You are Mr.?

4 MR. HORN: Mr. Horn, of Correctional Services.

5 MR. DOUGLASS: He is the director of the program.

6 THE COURT: I called you in because I think that
7 this case turns very substantially on the legal question of
8 entitlement that has been discussed in your brief and I guess
 in the plaintiffs' too.

10 This in turn depends on the facts. You were
11 not here last time, Mr. McKay, but I indicated that I
12 couldn't find anything in the record that indicated that
13 the members of the program had actually been informed that
14 participation could be terminated on the basis of the
15 conditions on which it was terminated.

16 I do have now from you, in the papers that you
17 filed October 1st, a copy of the form, which has got at the
18 bottom of it, "Rev 2/5/76," and which is entitled, "State of
19 New York Department of Correctional Services Memo of Agree-
20 ment, to be signed by client at initial interview."

21 In this case it is the Edgecombe Correctional
22 Facility. It states regulations governing temporary release
23 programs. I am ready to assume, unless the plaintiffs'
24 counsel challenges the question or the fact, that indeed,
25 the members of the program did sign such forms when they

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2 entered into it.

3 Is there any reason to believe that they did not

4 MS. HERMAN: I have no reason to believe that th
5 did not, your Honor.

6 THE COURT: Then the question is what the
7 language means and how it is to be construed.

8 I want to discuss that, in the first place, and
9 also wanted to get more factual background, if I can.

10 Well, let me ask this:

11 I have looked at this language and I would be
12 less than candid if I didn't say that I don't think it is
13 conclusive. It does say, of course, that "I understand that
14 any participation in the program is a privilege which may be
15 revoked at any time."

16 However, that language is set in the context
17 of various types of misconduct which can act as a basis for
18 revocation. I think I should read that into the record.

19 It says, for example, "I will carry a copy of
20 my temporary release authorization on my person at all times
21 while I am on work/educational or family tie furloughs away
22 from the premises of the facility, and I will exhibit it to
23 any police officer upon his request."

24 Then it goes on to say, "I understand that my
25 participation in the program is a privilege which may be

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2 revoked at any time, and that if I violate any provisions of
3 the program, I may be taken into custody by any police
4 officer and I will be subject to disciplinary procedure."

5 To me, the construction of that passage, which I
6 think could be supplemented by other forms of possible viola-
7 tions that preceded what I read, is such as to lead a
8 reasonable person to conclude that the statement that this
9 was a privilege which could be revoked meant that it could be
10 revoked if the participants violated any of the items that
11 were specified in the document itself, but not for any reason
12 at all, including a change in the law on the part of the
13 legislature.

14 At our last get together, Commissioner Douglass
15 did, with his usual candor, state, if I am right -- and I
16 don't want to put him on the spot by assuming he said some-
17 thing he didn't -- that he did believe that participants in
18 the program assumed that, roughly speaking, as long as they
19 obeyed the requirements of the program -- or to use the
20 vernacular, "kept their noses clean;" that's my statement,
21 not his -- they would be able to continue in the program.

22 Indeed, if I understand him correctly, he said
23 that those who were administering the program construed it
24 that way themselves. We didn't have a reporter here last
25 time, Commissioner, and I wanted to be sure that I had

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2 understood that correctly. If that wasn't what you said, I
3 don't want to charge you with the statement.

4 COMMISSIONER DOUGLASS: I meant to say that
5 the inmates probably expected to stay in the program. We
6 didn't expect the legislature to cut back the program. But it
7 had been our practice, and it had always been, that if you
8 violate the rules you are entitled to a Superintendent's
9 hearing if you are removed from the program.

10 THE COURT: Right

11 COMMISSIONER DOUGLASS: But that we could remove
12 you from the program for programmatic reasons. We could make
13 the judgment that this particular placement is inappropriate,
14 and if that is the reason for the removal, we would take
15 the position that there would be no requirement for the
16 hearing.

17 THE COURT: Aside from your view that you had
18 that power -- which you may or may not have had -- the
19 department, to your knowledge, in fact exercises the power
20 to remove people from the program for reasons other than
21 violations of the conditions set forth?

22 MR. DOUGLASS: I don't know. I do know that
23 we specifically set forth that issue. I don't now remember
24 what the purpose of the meeting was, but that issue has
25 come up several times and we have always been careful,

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2 always to have Superintendent's hearings when we allege
3 violations of the rules and when we make no allegation of
4 the rules not to grant Superintendent's hearings. Because
5 we wanted to make it clear that our position was that we
6 could remove from this program without hearing.

7 THE COURT: Well, this leaves me still somewhat
8 at a loss.

9 I do think that the question of entitlement --
10 which is the legal criteria that I have to be guided by here--
11 in a situation of this kind, depends very much on the history
12 of the administration of the program.

13 Do counsel agree with that?

14 MS. HERMAN: I think that is so, your Honor.
15 I think, as Mr. Douglass was saying, in the past when
16 people have been removed from the temporary release program,
17 it has been pursuant to a Superintendent's proceeding and
18 pursuant to some finding of misbehavior, either a violation
19 of rules or unsatisfactory performance.

20 THE COURT: I gather that the director of the
21 program is with us?

22 MR. HOPN: I have only been the director since
23 June 28th.

24 THE COURT: Do you know anything about this?

25 MR. HORN: Let me give you an example:

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2 If you have an individual in work release -- and
3 this has occurred in the past -- and the purpose of the
4 program is that he be able to work, and he were to, for some
5 reason, become handicapped, we would then say that he is
6 programmatically unsuitable for that program and remove him,
7 and perhaps remove him to Fishkill or that --

8 THE COURT: I don't believe anyone would dispute
9 that.

10 MR. HORN: The same thing would ensue when based
11 on the judgment of the counselor or the parole officer involved
12 the individuals' attitudes -- ability to obtain a job per-
13 haps, given the employment market -- was such that that place
14 could be better utilized by someone who is more employable,
15 and there would be no disciplinary allegation and no punish-
16 ment or keep lock imposed. He would perhaps be sent to a
17 vocational training program upstate that would be more suited
18 to his needs. This does occur.

19 MS. HERMAN: By way of response, I think the kinds
20 of things Mr. Horn is describing are things which, if they
21 did result in revocation in the past, were fairly infrequent
22 occurrences. I think most of the things that people in the
23 program, including these plaintiffs, have seen to happen
24 through their experience would have been that people were not
25 removed unless they were doing something wrong.

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2 THE COURT: Are you in a position to estimate
3 for me what the percentage is of the cases where people
4 were taken off the programs for other than violations, let's
5 call them?

6 MR. HORN: I couldn't give you a hard estimate.
7 Again, I have only been there since the end of June, but
8 my perception is that it is a relatively small number.

9 THE COURT: Right.

10 MR. HORN: That may indeed be a function of the
11 inability of the counseling staff and parole officers to
12 keep up with that sort of thing and so disciplinary functions
13 get more attention.

14 THE COURT: It may be, but I am not sure that
15 the reasons for its being so are necessarily relevant to our
16 discussion.

17 MR. HORN: I would agree that it is not a
18 large number, but it certainly does occur.

19 MS. HERMAN: I think that to the extent that
20 our experience would be relevant, we have been in operation
21 for a year. We get thousands of requests from prisoners who
22 believe they are having a legal problem. In every request
23 for assistance that we have ever had with regard to somebody
24 being revoked from a release program, the revocation was
25 being founded on some sort of charge for misconduct.

The other comment I would like to make is that even the kinds of things that Mr. Horn is describing are things which involve changes in relevant facts, facts relevant to somebody's participation in the program. If you become handicapped, if you cannot find a job, it is a change. It is a perceptible change in the criteria which somebody might want to apply in deciding whether you should participate in the program.

THE COURT: It is something that either the participant committed or that occurred with regard to his personal status. Is that a fair way of putting it?

COMMISSIONER DOUGLASS: I don't think there is any dispute about the facts. We clearly would take the position that that practice couldn't alter the statute, and that the statute was clear, and that the program is only manageable if we can remove people from the program.

THE COURT: That's a legal question, of course. That is what I have to decide.

Furthermore, I want it to be understood that should I decide in favor of the plaintiffs in this particular set of facts, that won't mean -- because I don't believe it is the case -- that the state doesn't have the power to run the kind of program that they are talking about. In other words, entitlements are based on a history, as I indicated.

Even if I should find that in this particular situation the group in question had acquired an entitlement - if that's the right verb to use -- nevertheless, it seems to me that could be a situation in which it was made perfectly clear in advance to a participant possibly that he might even be removed on the basis of a change in law.

But that is also perhaps a legal question. I am not trying to curb or comment on the powers of the state.

On the whole, I agree with the state, that the state in general circumstances has the kinds of powers that it asserts. I think perhaps, without forcing the plaintiffs to agree, they may do that too. Are there any other questions we wanted to ask?

MS. FINN: I think that was the main question, about the expectation of the inmates.

THE COURT: Nothing else?

Well, let me say this. Because the question of entitlement is so definitely and universally a factual question, one might expect that a judge would hear some testimony about it in a matter of this kind. I am satisfied with the record I now have on the basis of the statements made on both sides.

Does anybody at the table feel that I should hear any testimony on this question? I would prefer not to,

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2 because I would like to decide this thing and get it out
3 of the way.

4 COMMISSIONER DOUGLASS: It seems to me that if
5 we are measuring entitlement, there is a question as to
6 whether these particular individuals were in the program long
7 enough to make any assumptions about what they were entitled
8 to. We don't have any facts before us as to how long John
9 Jones was in the program. And how do we know that his
10 experience built up a source of entitlement?

11 THE COURT: Well, that's an argument I can under-
12 stand your making, but it would seem to me that the control-
13 ling factor probably would be -- and I am going simply now
14 on the description of the situation that I have heard from
15 all of you collectively -- that entitlement in that case or
16 expectations in that case would be built up on what the
17 history of the program had been within the institution, and
18 what people understood about it on the grapevine; prisoners
19 being notoriously informative on a grapevine basis.

20 I really think that would be the way you have
21 to look at it. I think it would degenerate if we started to
22 hold a hearing for each person as how long he had been in
23 the program and what he had heard. I think I can only proceed
24 on an overall fact basis.

25 All right. I think now I have everything I need

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2 to come to a conclusion on this matter and I will come to
3 a conclusion on it as quickly as possible.

4 You look as if you want to know about the other
5 people.

6 I don't feel it is appropriate for
7 me to issue a temporary restraining order with regard to the
8 parole people. I do understand the upsetting nature of the
9 impact it presents to them. But I feel that really the Court
10 shouldn't step into it with regard to what must be a limited
11 number of people. It seems to me that the imminence of their
12 release, while constituting a good argument for the proposi-
13 tion that the Court isn't really being asked to do very much,
14 is kind of a double-edged sword. It is true that you may
15 not be asking me to do very much. On the other hand, the
16 damage to the people themselves really isn't all that much,
17 because, while it would be in my opinion much better for them
18 to be allowed to go out and find a home and a job before they
19 are finally released, one cannot think that it will neces-
20 sarily be any easier to find a home and a job this week than
21 next week.

22 There is always a day one, whether you are
23 actually on parole or whether you are in a pre-parole status.

24 MS. HERMAN: Your Honor, if I may make clear
25 what our position is, we are not asking the Court to order

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that these men be given furloughs. As I understand the situation, because of the decisions made on August 25th or thereabouts revoking the temporary release status of these men, these men are now being told that they are ineligible for applying for furloughs.

Our position is and has been throughout that the statute does not make these men ineligible. For the majority-

COMMISSIONER DOUGLASS: They have not been told -- they should not have been told that.

THE COURT: That is not correct?

COMMISSIONER DOUGLASS: They can always reapply.

MS. HERMAN: I have things here that men were told they were ineligible.

THE COURT: I would look at it differently if they were told that they are ineligible to apply for a furlough.

MS. HERMAN: We would ask that the order not deny them.

THE COURT: Let's be sure we are proceeding on correct, factual assumptions.

MS. HERMAN: If I may hand up to the Court, after showing it to Mr. McKay, a letter that I received today from one of the plaintiffs here, Robert Oakley.

COMMISSIONER DOUGLASS: I take that back. We apparently have said orally to inmates that they cannot

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2 apply.

3 MR. HORN: I think it was said in writing.

4 MR. McKAY: That's with the exception of that one
5 inmate in the educational program who has been told specifi-
6 cally that he can reapply.

7 MS. HERMAN: For the temporary release program.
8 I'm talking here about men who are applying for furloughs
9 who were told that they are not eligible for any form of
10 temporary release program including furloughs. This gentle-
11 man applied for a family furlough to re-establish family
12 ties, and received a notification which he attached to his
13 letter, stating that he is ineligible for any temporary
14 release program.

15 COMMISSIONER DOUGLASS: Just a minute, I was
16 right.

17 This is a directive and they may reapply after
18 September 1st, in accordance with the new considerations.
19 This is a document given out to the staff which anticipated
20 certain questions and set forth the questions they were
21 supposed to give:

22 "Are inmates removed from the work release pro-
23 gram considered unsuitable for all forms of temporary
24 release programs?"

25 And the proposed answer was:

"No, the inmate may reapply for consideration using the revised selection criteria after September 1st."

It was always my impression that they could reapply, and that's what these papers say.

THE COURT: If the department is prepared to represent to me that persons to whom Ms. Herman is referring-- how should we describe them?

MS. HERMAN: I would think it would be everyone within the class of 140 people on the preliminary injunction motion who have applied for furloughs or who wish to apply for furloughs.

THE COURT: Those people are free now, since it is after September 1st, to apply for furloughs. I will deny the application for restraining orders requiring that, of course.

I gather that you do so represent; is that correct?

COMMISSIONER DOUGLASS: Yes, they are eligible.

MR. HORN: It is possible it will be worked on a case by case basis.

MS. HERMAN: To whom should I refer inquiries from people who do wish to apply for furloughs who have been told they are ineligible?

COMMISSIONER DOUGLASS: We will have those people

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2 make an application to the Temporary Release Committee.

3 THE COURT: I'm glad this was less serious than
4 expected.

5 Does that take care of it? Have we talked about
6 everything you want to talk about?

7 MS. HERMAN: I have nothing else.

8 THE COURT: All right. This is is on my mind, so
9 I will try to get it out quickly.

10 COMMISSIONER DOUGLASS: I don't know if this is
11 pertinent to the decision.

12 When we prepared this affidavit we didn't know
13 what the parole board had done. We now know.

14 THE COURT: They have done what?

15 COMMISSIONER DOUGLASS: There was a category of
16 people who were taken out of the program who were within 60
17 days of appearing before the parole board. When we prepared
18 the action, we didn't know what action the parole board would
19 take on those individuals. We now know the action they
20 took.

21 THE COURT: What are you looking at?

22 COMMISSIONER DOUGLASS: My copy of the affidavit,
23 and the following people were within 60 days of parole board
24 appearance. At the time we drafted this affidavit, we didn't
25 know what action the parole board was going to take on these

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2 people. We now know, because they have been before the parole
3 board.

4 THE COURT: That relates to this question of
5 furloughs, is that right?

6 MR. MCKAY: Right.

7 THE COURT: I think in the light of what you
8 are telling us that they are free to apply or eligible.

9 MS. HERMAN: And they will be considered
10 eligible for furloughs?

11 MR. HORN: Except if they have escape convictions.

12 MS. HERMAN: What I am concerned about is that,
13 because of the nature of their offense, people who were
14 approved for the program and then were revoked pursuant to
15 the new law, because of the nature of their offense, are
16 being told that they are not eligible. In fact, that
17 is the thrust of the state's paper. It is that they have
18 become ineligible.

19 THE COURT: Because, for example, they have
20 committed a type of offense referred to in the amended
21 statute?

22 MS. HERMAN: That's correct.

23 THE COURT: Let me make clear -- although I
24 don't think I should need to -- that I construe the statute
25 in regard to any aspect of the temporary release program as

not automatically excluding a prisoner from participation in the program, but merely requiring the Commissioner to review that prisoner's total record -- let's put it that way -- and to determine whether or not the prisoner may participate.

The legislature doesn't say "All people who have committed crimes of a certain character may not participate in the program." They simply said they may not participate until the Commissioner had reviewed the matter and reached a decision.

Therefore, I assume that your representation is that they may apply for a furlough. My construction of the law is that if they do apply for the furlough, the mere fact that they may fall into the classification doesn't automatically exclude them, but that the Commissioner was exercising his discretion rationally and fairly in determining whether or not they are entitled to a furlough.

MS. HERMAN: That was precisely our concern; that they not be considered ineligible.

COMMISSIONER DOUGLASS: One modification. There are a small group of men who are ineligible; the escapees and absconders and those who have parole board appearances for twelve months. The other point we want to make is that in exercising his discretion, the Commissioner has set up a review process and you can be screened out of that review process before it comes to his desk. But it is an orderly

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2 process which people can challenge under New York State
3 law.

4 THE COURT: Don't suggest it.

5 COMMISSIONER DOUGLASS: I was waiting for that
6 one.

7 MS. HERMAN: I would like to know whether it is
8 agreed that these men would not be considered ineligible
9 solely on the basis of their offense.

10 COMMISSIONER DOUGLASS: No. The statute deter-
11 mines eligibility. We couldn't .

12 THE COURT: You agree with what I just said?

13 COMMISSIONER DOUGLASS: Yes.

14 MR. HORN: If we have an escape conviction
15 question, they are ineligible. If they do not fall in these
16 three categories, then the application should be accepted
17 should it be processed. It could be bounced out along the
18 line, but we have an appeals process.

19 I would say if any inmate is being told by a
20 temporary release committee that because he was pulled out
21 he can't apply, you ought to get in touch with me and we
22 will straighten it out on a case by case basis.

23 MS. HERMAN: I will refer that to you?

24 MR. HORN: Yes.

25 THE COURT: Thank you.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RECEIVED
BY MAIL

OCT 17 1977

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JAMES TRACY, WILLIAM ADAMS, ROBERT
ARNOLD, ARTHUR BETSCH, SANTOS
CEPEDA, DOUGLAS COLEMAN, HAROLD
GONZALEZ, LENNEL HOWARD, ELLIOT
HUNT, BILLY LITTLE, LARRY MOORE,
ROBERT OAKLEY, EMANUEL ORDINE, JR.,
LARRY PLEASANT, GEORGE REED, ANTHONY
REPETTI, CORDELL ROBINSON, WILLIAM
RODRIGUEZ, DENNIS SOARES, MICHAEL
THOMAS, and JOHN TURRISI, on behalf
of themselves and all others simi-
larly situated,

DEPARTMENT OF LAW
NEW YORK CITY OFFICE

77 Civ. 3937

MEMORANDUM

Plaintiffs,

-against-

DOMINICK SALAMACK, Superintendent,
Bayview Correctional Facility;
CAPTAIN HYLAN T. SPERBECK, Correction
Officer, Bayview Correctional Faci-
lity; BENJAMIN WARD, Commissioner,
Department of Correctional Services,
State of New York,

Defendants.

-----X
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LASKER, D.J.

In 1969, the New York State correctional system instituted a Temporary Release Program^{1/} designed to help inmates eligible for parole to reintegrate into society.

An inmate who is eligible for parole to the program within one year may apply. If accepted, he is assigned to a work release facility from which he may seek either employment or schooling. In July of 1977, in reaction to incidents which disquieted the legislature and the public, the New York legislature amended the Temporary Release Law. The amendments specify that no applicants for the program convicted of any of three particular offenses may participate in the program without the written approval of the Commissioner of Correctional Services.^{2/} The effective date of the amended statute was September 1, 1977. Nevertheless, in August of 1977 the Department of Correctional Services, without having first promulgated regulations as required by the statute, engaged in a four step review procedure of 824 temporary release participants and removed 140 from the program.^{3/} The 140 inmates have brought this civil rights action and move for a preliminary injunction requiring the Department to reinstate them and to grant them hearings complete with the requirements of Morrissey v. Brewer, 408 U.S. 471 (1972) before any future change in their status.^{4/} For the reasons

stated below, the injunction is granted.

I.

A preliminary injunction may be granted only upon "a clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief." Triebwasser & Katz v. American Tel. & Tel., 535 F.2d 1356, 1358 (2d Cir. 1976); Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973) (emphasis in original). There is no doubt that the balance of hardships in this case tips decisively in favor of the participants in the ~~temporary~~ release program. While the Department of Correctional Services would of course be confronted with a significant administrative burden if pre-revocation hearings are required in the case of these plaintiffs, ^{5/} that hardship cannot be equated with the plaintiffs' continuing loss of the substantial freedom and range of opportunity which they enjoyed before the August pullback, and of which they have been deprived not because of fault but because of a restructuring of the statute. An injunction may not be granted, however, unless plaintiffs also raise questions

which are sufficiently serious to create "a fair ground for litigation." This condition requires analysis of the merits of their case.

II.

Plaintiffs argue that the Due Process Clause of the Fourteenth Amendment protects them against removal from the temporary release program without a prior hearing. Two factors govern the determination whether due process calls for a hearing: whether plaintiffs have suffered a "grievous loss" of a liberty or property interest, Morrissey v. Brewer, *supra*, 408 U.S. at 481; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (Frankfurter, Jr., concurring), and whether they have an "entitlement" to this liberty or property interest arising out of federal or state law or practice. Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).

A. Grievous Loss

Plaintiffs analogize removal from a temporary release program to parole revocation and to loss of conditional release rights, which are well-recognized to constitute grievous losses of liberty, meriting due process protection under the Fourteenth Amendment. Morrissey v. Brewer, *supra*, 408 U.S. 471; United States ex rel. Bey v. Connecticut, 443 F.2d 1079 (2d Cir. 1971); Zurak v. Regan, 550 F.2d 86 (2d Cir. 1977). The argument runs that, like

parolees, temporary release participants enjoy a form of conditional liberty: they may spend up to fourteen hours a day outside prison, participating in employment or schooling. Indeed, the very purpose of temporary release is to lessen the shock of returning to society by offering much of the freedom of parole. While the temporary release participant, unlike a parolee, must normally return to his work release facility at night, even this distinction is not overwhelming since overnight and weekend furloughs are commonly available. Plaintiffs also compare their loss to impairment of the interest in conditional release, which was held in Zurak v. Regan, supra, 550 F.2d 86, to require due process protection. Zurak and the parole revocation cases, plaintiffs argue, establish that a broad range of interests in conditional liberty are entitled to the safeguards of the Fourteenth Amendment.

The comparison between these forms of conditional freedom is persuasive. However, plaintiffs are not limited to analogy in establishing that the magnitude of harm resulting from loss of temporary release status is enough to invoke due process. This Circuit has already held that inability even to commence participation in such a program works a grievous loss. In Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975), an inmate contested his

classification, without formal notice or explanation, as a special offender, a classification which made him ineligible to apply for certain rehabilitative programs, including work release. The Court of Appeals held that such ineligibilities constituted a grievous loss requiring at least the basic elements of due process. This decision finds recent support in the Seventh Circuit's holding in Holmes v. United States Board of Parole, 541 F.2d 1243 (7th Cir. 1976), in which the classification of an inmate as a special offender without a prior hearing was invalidated on the reasoning of Cardaropoli. The Holmes court held further that the Supreme Court's ruling in Meachum, supra, 427 U.S. 215 (which followed Cardaropoli by a year) did not require a different disposition.

B. Entitlement

In Meachum v. Fano, supra, 427 U.S. 215, the Supreme Court held that sufferance of a grievous loss does not, alone, compel the application of the Due Process Clause, but that some right or expectation rooted in state law must protect an individual against such a loss. Fano was a prisoner who sued to invalidate his transfer from a medium to a maximum security prison without a due process hearing. Granting that Fano's transfer might constitute a grievous loss, the Court held that he could nevertheless be transferred without a hearing because no

state statute or practice had endowed him with an entitlement to remain in a particular type of penal facility or not to be transferred without a hearing.

Relying on Meachum, the state argues that, even if removal from the temporary release program is determined to be a grievous loss, the Due Process Clause is inapplicable since no constitutional or statutory right exists to participate in the program. In particular, the state points to language in both §853(8) of the Penal Law which governs the temporary release program^{6/} and the form agreement signed by each enrolling participant which specifies that participation is a privilege which may be revoked at any time. Plaintiffs respond that whether an entitlement has been created must be determined by looking to the reasonable expectation of the inmate based on a variety of factors, including not only the statute and regulations, but also history and prior practice.^{7/} Two factors in this case, the wording of the form agreement and official policy concerning removal, persuade us that a reasonable person, once accepted, would expect to be allowed to continue in the program unless by his own conduct he gave cause for removal.

The state's dependence on the statutory language is unpersuasive if only because it is unreasonable to assume, or to believe, that a prisoner will know the

language of a statute -- even of a statute dealing with a subject so dear to his heart as temporary release, and even in this day of jail-house lawyers. Nor is this a sector of the law in which the principle of constructive knowledge is fairly applicable.

The state is on stronger ground in arguing that a prisoner is chargeable with knowledge of the wording in the agreement he signs and of prison procedure governing revocation of temporary release status. The wording of the program memorandum, signed by each participant, states as follows:

"I accept the foregoing program and agree to be bound by the terms and conditions thereof. I understand that I will be under the supervision of the state department of correctional services while I am away from the premises of the institution and I agree to comply with the instructions of any parole officer or other employee of the department assigned to supervise me. I understand that my participation in the program is a privilege which may be revoked at any time, and that if I violate any provision of the program I may be taken into custody by any peace officers and I will be subject to disciplinary procedures.
(emphasis added)

It is true that the agreement read literally provides that "participation in the program is a privilege which may be revoked at any time." However, literalness is not enough. A more natural reading of the agreement

when read in context, as it must be, is that removal is not discretionary but occurs only following one of the specific acts listed earlier in the agreement, that is rejecting departmental supervision, disobeying the instructions of prison officials, or violating some other provision of the program. Moreover, the practice of the state since initiation of the program has actually been to revoke temporary release status only upon a showing of misbehavior. (Plaintiffs' Memorandum at 20-21) These factors establish, and we find that, a participant did have a reasonable expectation, arising from the practice of the state itself, of a right to continued participation in the program so long as he did not commit an offense within the letter or spirit of the agreement and that he cannot be deprived of this entitlement without appropriate and due process. Indeed, as Commissioner Lewis L. Douglass himself stated to the court with commendable candor (at argument of this motion on the record), prior to the statute's amendment it had been the expectation of the Department as well as the inmates that participants would continue in the program absent a specific violation.

This analysis is supported by the recent decision in Holmes v. United States Board of Parole, supra, 541 F.2d 1243, which held after Meachum, that due process hearing rights do attach to classification as a special offender.

The Holmes court reconciled its holding with Meachum on the ground that established prison policy created an entitlement to apply for rehabilitative programs:

"While there may exist no right to furlough or parole as there exists no right to incarceration in a particular prison, the extension to prisoners by established prison policy of the opportunities of parole and furlough, constitutes a cognizable benefit to prisoners. No such cognizable benefit was bestowed upon the prisoners in Meachum or Montayne and we do not read those cases to eliminate due process where cognizable benefits have been established by prison policy..." (emphasis added).

III.

In sum, we find that revocation of participation in the temporary release program constitutes grievous loss in regard to an entitlement and therefore may not occur without a hearing in accordance with appropriate and due process. It remains to determine the scope of due process appropriate in the circumstances. Morrissey v. Brewer, supra, 408 U.S. at 481; Goldberg v. Kelly, supra, 397 U.S. at 262-63; Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). That question will be disposed of hereafter upon further conference with the litigants.

In the meantime, the defendants are ordered to reinstate the members of the plaintiff class (other than those persons alleged to have been convicted of escaping

or absconding or whose next Parole Board appearance will occur later than September 2, 1978) to the temporary release program, and the defendants, their employees and agents are enjoined from removing such persons from the temporary release program except under the same terms and conditions upon which removals were made immediately prior to the removal of the members of the plaintiff class in August, 1977.

The effect of this order is stayed until 5:30 P.M. October 19, 1977.

Dated: New York, New York
October 14, 1977.

MORRIS E. LASKER

U.S.D.J.

FOOTNOTES

1. N.Y. Correction Law §§851 et seq. (McKinney's Supp. 1976-77).

2. The pertinent portion of the amended statute reads as follows:

"If an inmate is denied release on parole, such inmate shall not be deemed an eligible inmate until he is within one year of his or her next scheduled appearance before the state parole board. No person convicted of any escape or absconding offense defined in article two hundred five of the penal law shall be eligible for temporary release. Notwithstanding the foregoing, no person who is an otherwise eligible inmate who is under sentence for a crime involving: (a) infliction of serious physical injury upon another as defined in the penal law, (b) a sex offense involving forcible compulsion, or (c) any other offense involving the use or threatened use of a deadly weapon may participate in a temporary release program without the written approval of the commissioner. The commissioner shall promulgate regulations giving direction to the temporary release committee at each institution in order to aid such committees in carrying out this mandate." §§851 et seq., as amended, July 13, 1977.

3. These four steps were followed: (1) each inmate was scored according to the "Vera Point Selection" system; (2) each case was then submitted to a three member panel for scrutiny in accordance with the governing statute; (3) recommendations concerning the participants were received from the superintendent of each release facility; and (4) the Central Office made an overall review in order to reach a final determination. (Affidavit of Commissioner Lewis L. Douglass at 3) In other words, the reasons for removal were based only in part on the factors set out in the amended statute.
4. Plaintiffs ask that their hearings include the right to counsel or counsel-substitute, the right to call

witnesses, the right to confront and cross-examine adverse witnesses, and the right to present a meaningful defense. (Complaint at 13)

5. The state argues that if a hearing were required prior to each revocation, the statutory goal of providing speedy removal from the program of all inmates representing a danger to the community would be frustrated. (Affidavit of Commissioner Lewis L. Douglass at 4-5) Our decision is addressed only to the 140 inmates who have brought this action, and there is no reason why granting these individuals hearings need interfere in the future with the Department's ability to implement the statutory intent. The Department can avoid the present dilemma easily enough by making it clear to future participants both in the agreement and verbally -- and in practice where necessary -- that their participation may be revoked for literally any reason. If this were done, it would prevent an entitlement from coming into existence.

6. §853(8) reads:

"Participation in a temporary release program shall be a privilege. Nothing contained in this article may be construed to confer upon any inmate the right to participate, or to continue to participate, in a temporary release program. The superintendent of the institution may at any time, and upon recommendation of the temporary release committee or of the commissioner or of the chairman of the state board of parole or his designee shall, revoke any inmate's privilege to participate in a program of temporary release."

7. There is little case law since the recent decision in Meachum, supra, 427 U.S. 215, explaining how an entitlement is created. Plaintiffs rely on the approach taken in Meachum itself, in which the Supreme Court referred to Wolff v. McDonnell, 418 U.S. 539 (1974), as providing an example of a state-created entitlement. In Wolff, the court looked to the entire state scheme of state statutes and prison regulations in determining that the structure and history of good time accreditation entitled prisoners to a due process hearing before revocation of such a credit. Plaintiffs also cite decisions by two Courts of Appeals in support of the argument that the manner in which

a program is administred can create an entitlement even when the governing statute does not. Zurak v. Regan, 550 F.2d 86 (2d Cir. 1977); Walker v. Hughes, 21 Cr. L. Rptr. 2349 (6th Cir. June 24, 1977). In Zurak, the court found that New York penal law created a justifiable expectation that inmates would be conditionally released if they met Parole Board standards. This decision was made despite language in the statute making release discretionary (New York Correction Law §827), indicating that the court looked to regulations and ^{practice} in concluding that an entitlement existed. In Walker, supra, 21 Cr. L. Reptr. 2349, 2350, the court stated explicitly that "rules and mutually explicit understandings" were to be considered in determining whether a liberty interest, protected by the Fourteenth Amendment, was created.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JAMES TRACY, WILLIAM ADAMS, ROBERT
ARNOLD, ARTHUR BETSCH, SANTOS
CEPEDA, DOUGLAS COLEMAN, HAROLD
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RODRIGUEZ, DENNIS SOARES, MICHAEL
THOMAS, and JOHN TURRISI, on behalf
of themselves and all others simi-
larly situated,

77 Civ. 3937

AFFIDAVIT

Plaintiffs,

-against-

DOMINICK SALAMACK, Superintendent,
Bayview Correctional Facility;
CAPTAIN HYLAN T. SPERBECK, Correction
Officer, Bayview Correctional Faci-
lity; BENJAMIN WARD, Commissioner,
Department of Correctional Services,
State of New York,

Defendants.

-----X

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Attorney for Defendants

Of Counsel: KEVIN J. MCKAY, ESQ.
Assistant Attorney General

BENJAMIN WARD being duly sworn deposes and says:

This affidavit is submitted to bring to the Court's attention those issues which should be considered in determining whether the action taken by me on August 25, 1977, in removing 140 inmates from the Temporary Release program was a proper procedure, in view of my continuing responsibility to operate the Department in a manner which protects the community from unnecessary risk.

The determination involves three considerations:

1. A description of the authority held by me on or about and prior to August 25, 1977, to: (a) remove inmates from the Temporary Release program, if in my opinion, their continued participation constitute a threat to the safety of the community, or (b) deny permission to inmates to leave the premises of a particular correctional facility because I believe his release would constitute a threat to the safety of the community.
2. The authority to remove inmates, particularly those who constitute a threat to the community, also stems from a continuing responsibility to improve the efficient operation of the Department by modifying, correcting or even reversing decisions of staff, particularly when those actions, if they were to remain unchanged, would create a threat to the safety of the community.

3. If the Court concludes that past practices have created an entitlement not to be removed from the program except pursuant to a disciplinary proceeding, that right must be balanced against the State's compelling need to protect the public safety.

THE AUTHORITY HELD ON AUGUST 25, 1977

Placement in the Temporary Release program is a two-step process. First, the sending institution, through the Temporary Release Chairman, makes a determination that an eligible inmate should be placed in the Temporary Release program. Upon being placed in such program, I then through the local superintendent make a decision about when and under what circumstance an inmate is to be released from the receiving facility.

That authority, which has been delegated to various superintendents, requires that they develop procedures for making that decision.

In one facility, Bayview for example, the superintendent has determined that a man must remain in the facility for two weeks before he can be considered eligible for a furlough. In another facility, the superintendent has determined that no man may make an application to leave the facility for a period of two days; in another facility the superintendent has determined that inmates may immediately apply for release.

Even after establishing required periods, which vary from superintendent to superintendent, they, with a staff of counselors and parole officers, must continually make judgments about the release of the inmate. That judgment requires an evaluation about whether the inmate, at a given point in time, constitutes a threat to the community.

It is particularly significant to note that inmates leaving the Temporary Release facility are searched on release and return, similar to search procedures employed in any prison. The leaving of the facility is not an automatic process.

The idea that this continuing judgment about the safety of the community is not new. Attached is a memo dated September 20, 1972, issued by former Commissioner, Peter Preiser, where on Page 2, he makes the point to the superintendents that the inmates who are to be released should not "present undue risk to the community".

In the circumstances before this court, if the inmates are ordered returned to Temporary Release program, that achieves the first step in the Temporary Release process. I must then, through the superintendent, make the second determination as to whether the inmate should be permitted to leave the facility.

In making that second decision about these particular inmates, I cannot close my eyes to the fact that a local superintendent, Central Office Parole staff, Deputy Commissioners, assisted by two-middle level management people,

have all after reviewing records of these inmates, concluded that the inmates constitute a threat to the community.

That review occurred in response to new legislation but the reason for the review is irrelevant. I cannot now close my eyes to that information once it is put before me, but must evaluate it in making the second decision about whether to release the inmates to the community.

If these inmates, in my judgment, cannot be released to the community because they constitute a threat to the community, I must house them in a facility where they can be contained. Hostile inmates cannot be contained in any New York City facilities which are designed for work release and not designed for 24-hour containment.

The argument has been made that local superintendents granted continuous permission to inmates to leave the facility and return each night after completing work, and that this continuous grant of permission by the superintendent not only created an "entitlement" but somehow voids my responsibility to protect the community. Although some superintendents granted weekly permission to go to work, each inmate who was in job search status, was required to obtain a daily pass based upon a parole officer's evaluation of the inmate and his potential threat to the community, and indeed even inmates who were employed have been held in by their parole or counselor without prior notice for a variety of purposes.

As in any large organization, systems are created to handle a large number of decisions. But whatever the daily practice of a local superintendent, he is accountable to me, and must justify to me the daily judgment to release a given person. I am accountable to the public for those daily judgments.

THE OBLIGATION TO IMPROVE
OPERATIONS OF THE DEPARTMENT

I am under the continuing obligation to improve the operations of the Department. That obligation to improve procedures is even more compelling under the Temporary Release program since the law which authorizes the program expires each September and is renewed by the Legislature after they review the operation of the program.

Clearly when I find mistakes pertaining to the exercise of delegated judgment, I must make changes.

If for any reason I review the judgment made by the Temporary Release Committee or a superintendent and find that the delegated judgment has been improperly exercised or exercised in a way as to constitute a threat to the community, I must take appropriate steps to correct that judgment.

There is no difference between removing an inmate where the initial judgment to place him on Temporary Release was improper because the inmate was statutorily ineligible than there is to remove an inmate whose initial placement in the program was improper because the inmate's presence constitutes a danger to the community.

When the judgment is made not to release, I must of necessity, return those inmates to a facility which is staffed and built so that the decision to restrict the inmate can be carried out.

THE BALANCE BETWEEN INMATE
ENTITLEMENT AND COMMUNITY SAFETY

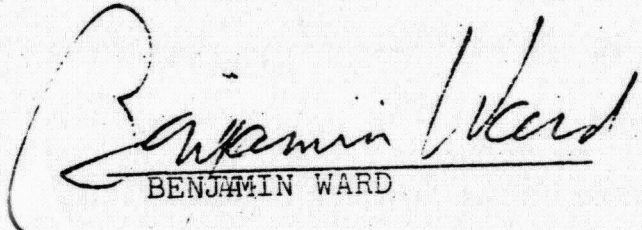
Even assuming that the inmate is "entitled" to non-removal except pursuant to disciplinary proceedings, that right must be weighed against the community's right to expect public officials to take such action as is necessary to minimize the risk to public safety. Time does not permit the submission of extensive legal briefs on this point. But the Courts, on numerous occasions, have balanced, even constitutional rights, against the State's compelling interest. See for example, *Schneider v. State* 308 U.S. 147, *Dennis v. U.S.* 341, U.S. 494 (1966) and The First Amendment Balance, 71 Yale L.J. 1424.

When confronted with conflicting rights, the Court must conduct a hearing to fully acquaint itself with the circumstances which surround those conflicting rights, in this case, the inmate's "entitlement" as against the compelling interests of the State not to unnecessarily expose communities to risk.

In such a hearing, the Court should examine the nature and background of the individual since their background is critical to the issue of the risk they pose, and then weigh that

risk against the State's compelling interest to protect the community.

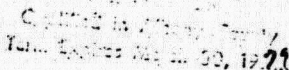
In the absence of a full-scale hearing, to bring to the Court all of the considerations necessary for the court to balance the interest of the inmate as against the compelling interest of the State, the Court should, in view of my judgment that these inmates constitute the threat to the safety of the community, hold that these inmates may be removed from the program pending the outcome of a limited departmental hearing where the inmate would be given an opportunity to present whatever facts, circumstances, or comments, they believe I should consider in making my judgment as to whether their continued participation in the program constitutes a threat to the safety of the community.


BENJAMIN WARD

Sworn to before me

this 21st day of October, 1977


New York


Notary Public

Notary Public



STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES

THE STATE OFFICE BUILDING CAMPUS

ALBANY, N.Y. 12226

PETER PREISER
COMMISSIONER

September 20, 1974

SUPPLEMENT #5 TO ADMINISTRATIVE
BULLETINS #12 AMENDED AND #63

TO: SUPERINTENDENTS OF CORRECTIONAL FACILITIES & CAMPS,
CENTRAL OFFICE GROUP AND DIVISION HEADS, PAROLE
INSTITUTION & AREA OFFICE DIRECTORS

FROM: PETER PREISER - COMMISSIONER *Peter Preiser*

RE: ROCHESTER, BAYVIEW AND EDGEcombe CORRECTIONAL FACILITIES

APPLICABILITY

The provisions of this Supplement only apply to inmates of the above-named facilities with Open Date-Own Program status, or with six months or less to initial Parole Board appearance for re-release consideration, or with six months or less to maximum expiration of sentence.

The purpose of this Supplement is to clarify the rationale for releasing inmates from the above-named facilities for participation in certain types of activities (i.e., furloughs for the purpose of maintaining or reestablishing family ties and temporary release for becoming reestablished in the community) and to set forth policies and procedures which shall govern the granting of such furloughs and releases.

This Supplement does not apply to other temporary release programs authorized by Article 26 of the Correction Law (e.g., work release, educational leave, leave of absence, community services program or furlough program authorized for such purposes as seeking employment, solving family problems or attending a short-term educational or vocational training course) for which governing policies and procedures have been promulgated in Administrative Bulletins #12 Amended, #63 and Supplement #3.

~~115~~ 115

RATIONALE

Consistent with the purpose of a residential treatment program which provides a transitional residence and a broad range of casework services for selected inmates who are ready for reentry into the mainstream of community life and productive living, inmates have opportunity through temporary release for maintaining or establishing family ties or establishing a home prior to release to parole supervision. Through assistance from professional staff and temporary release, inmates are also provided with opportunity to develop educational or employment contacts in the area of their ultimate residences, and to begin to attend school or work on a regular basis.

The inmates, however, are still legally and conceptually incarcerated. They must conform to the rules and regulations of the facility and demonstrate responsible behavior within the facility or when in the community. Each temporary release program granted must have a specific purpose consistent with the rehabilitative program of the inmate which benefits him or his family, and at the same time does not present undue risk to the community.

GUIDELINES AND PROCEDURES

1. Furloughs for the purpose of maintaining or reestablishing family ties are of primary importance and may be granted in accordance with the following criteria and schedule:

- a. Inmates who have resided with family members (including common-law relationship), or relatives or legal guardians prior to incarceration and whose parole programs will include residences with such persons, may be granted a week-end furlough every week to the homes of such persons for the purpose of maintaining family ties.
- b. For a special family occasion (such as attending a wedding or similar family event), inmates may be granted furloughs during reasonable and necessary hours to attend such events.
- c. Inmates not qualified under section 1.a for week-end furloughs but who have need for reestablishing family ties, may be granted a one-day furlough - not exceeding the hours of 8:00 a.m. to 10:00 p.m. - on the second week-end following arrival at the facility and a one-day furlough every week-end thereafter for the purpose of reestablishing family ties.

2. Temporary release for the purpose of becoming established in the community may be granted in accordance with the following criteria and schedule:

- a. Inmates who do not qualify under paragraph 1 above (i.e., without family ties) may be approved for a one-day temporary release - not exceeding the hours of 8:00 a.m. to 10:00 p.m. - on the second week-end following arrival at the facility and a one-day temporary release every week-end thereafter if a responsible friend or volunteer worker agrees to escort to an organized community program such as sponsored by the Salvation Army or YMCA which assists inmates to become reestablished in the community.
- b. Individuals without family ties who are approaching Parole Board appearance for release consideration, or if they are Open Date-Own Program cases who have demonstrated stability in work release or training, may be granted a daytime temporary release over the week-end during reasonable and necessary hours to establish suitable residences. If appropriate, such individuals may be granted a week-end temporary release at such residence.

3. Prior to the granting of furloughs outlined above, there must be verification of each proposed residence address, willingness of spouse, family member or relative to accept the inmate at the home. Similar verification must be made to confirm requests for any special furloughs, or temporary releases involving activity to become reestablished in the community with the assistance of a responsible friend or volunteer worker. Every inmate granted furlough or temporary release must possess a program memorandum (TRP-3) giving details of the program. Finally, there must be follow-up to evaluate the inmate's behavior on furlough and needs for counseling or casework services.

SW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
JAMES TRACY, et al., :
Plaintiffs, : AFFIDAVIT
-against- : 77 Civ. 3937
DOMINICK SALAMACK, Supt., et al., : (MEL)
Defendants. :
-----x

STATE OF NEW YORK)
:SS.:
COUNTY OF NEW YORK)

MARTIN F. HORN, being duly sworn, deposes and says:

This affidavit has been prepared in consultation with Commissioner Benjamin Ward and Executive Deputy Commissioner Lewis Douglass. It is being submitted by the affiant, rather than by Commissioners Ward or Douglass, since the affiant is presently in New York City and in order to facilitate the Court's early consideration of these matters.

The affiant feels that the Court should consider these questions and that the Court's order should provide answers to these questions. Included in this affidavit are the Department's comments on these questions, which we request the Court consider.

1. Must the plaintiff class inmates be returned to the same facilities from which they were removed on August 25, 1977?

Comment: The Court is advised that since August 25, 1977, the work release programs at Eastern Correctional Facility and Clinton Correctional Facility have been phased out, and that the statutorily required work release designation has been rescinded at Tappan Correctional Facility. Additionally, Fulton Correctional Facility is now empty of all work release inmates and the Department plans to transfer into Fulton only inmates approved under the selection procedure implemented on September 1, 1977.

2. If the answer to the foregoing question is yes, must the Department open the closed work release programs just for these inmates?

3. If the inmates need not be returned to the very same facility from which they were removed, must the inmates removed from New York City facilities be returned to work release facilities in New York City?

If the answer to the foregoing is yes, when and for how long each day should they be released on job search furloughs?

Comment: The Department contends that having now determined that these inmates are dangerous and that their release at this time would pose a danger to the community, the Superintendent at any facility cannot consistent with public responsibility authorize their release. Furthermore, in view of the fact that the New York City Work Release Facilities are not designed to house inmates who are not being permitted release, security considerations warrant their transfer to a more secure facility.

4. Must these inmates be permitted weekend, family visit furloughs? If so, when and with what degree of frequency?

Comment: The Department contends that having determined that to release these inmates at this time would pose a danger to the community, Superintendents cannot, consistent with their public responsibility, authorize their release. Additionally, present policy is not to permit weekend furloughs to work release inmates if they are not employed and insofar as plaintiff class inmates are unemployed, they would not be granted weekend furloughs.

5. Are the plaintiff class inmates to be reinstated subject to the same terms and conditions as existed prior to August 25, 1977? If so, at what point in time would they become subject to new regulations?

Comment: Consistent with the legislative intent expressed in the amended Temporary Release Law, the Department has promulgated new and more restrictive regulations for temporary release. These regulations specifically include a mechanism for the removal of inmates from the program other than for disciplinary reasons. This has been included because this lawsuit suggests the Department's previous failure to explicitly provide for such removal creates an entitlement on the part of the inmate not to be removed except for disciplinary violations (see FN.5 of original order, subsequently rescinded).

Further, the Department contends that it would be disruptive of facility operations to have within a facility 2 classes of inmates, each subject to different regulations.

6. In the upstate facilities, must the plaintiff class inmates be housed with other work release inmates regardless of whether they are employed?

Comment: In upstate facilities, jobs are developed through Departmental efforts rather than through inmate job search. Particularly in light of the recent and extensive publicity in the upstate media resulting from the killing of a police officer near Buffalo by a work release absconder last week, it is anticipated that job placement of plaintiff class inmates will be extremely difficult. This will be exacerbated as the employers become aware that these inmates have been reinstated by Court order despite the Department's belief as to their dangerousness.

Insofar as work release inmates are generally housed separately in less secure settings designed for inmates who are released to work, security considerations mitigate against housing plaintiff class inmates in work release units if they are unemployed and are not being released.

7. It is particularly important that the Court provide in its order specific answers to these questions. Specifically, the Court should stipulate the hours and days when plaintiff class inmates are to be released, since the Commissioner is of the opinion that these inmates are dangerous and therefore, he cannot authorize their release at this time consistent with his public responsibility.

The Commissioner feels that if the Court fails to provide such specific direction, particularly with respect to the days and hours of inmate release, there will be unnecessary confrontation between the Department's employees and inmates resulting from incorrect expectations held by the inmates.

Walter F. H.

ORDER TO REMOVE AND
OCTOBER 11, 1977

[Signature]

DAVID G. SPRACKIN
Notary Public, State of New York
No. 3347204
Qualified in Nassau County
Commission Expires March 20, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY OF VERIFICATION
RECEIVED
DEPARTMENT OF LAW

11 24 1977
NEW YORK CITY OFFICE

-----X
JAMES TRACY, WILLIAM ADAMS, ROBERT
ARNOLD, ARTHUR BETSCH, SANTOS
CEPEDA, DOUGLAS COLEMAN, HAROLD
GONZALEZ, LENNELL HOWARD, ELLIOT
HUNT, BILLY LITTLE, LARRY MOORE,
ROBERT OAKLEY, EMANUEL ORDINE, JR.,
LARRY PLEASANT, GEORGE REED, ANTHONY
REPETTI, CORDELL ROBINSON, WILLIAM
RODRIGUEZ, DENNIS SOARES, MICHAEL
THOMAS, and JOHN TURRISI, on behalf
of themselves and all others similarly
situated,

Plaintiffs,

-against-

DOMINICK SALAMACK, Superintendent,
Bayview Correctional Facility;
CAPTAIN HYLAN T. SPERBECK, Correction
Officer, Bayview Correctional Facility;
BENJAMIN WARD, Commissioner, Department
of Correctional Services, State of New
York,

Defendants.

77 Civ. 3937
(MEL)

AFFIDAVIT

-----X
STATE OF NEW YORK)
COUNTY OF NEW YORK)
SOUTHERN DISTRICT OF NEW YORK) SS.:

SUSAN N. HERMAN, being duly sworn, deposes and says:

1. I am an attorney with Prisoners' Legal Services
of New York, representing the plaintiffs in the above-captioned
proceeding, and am familiar with all prior proceedings had
herein.

2. I make this affidavit in opposition to defendants'

motion to alter or amend the judgment entered upon this Court's order of October 14, 1977.

3. As is more fully set forth in plaintiffs' memorandum of law submitted herewith, I believe that defendants have failed to show or even to specifically allege that it was their policy and practice prior to August, 1977, to deny a person previously approved for participation in the temporary release program permission to be released from the work release facility where he was confined to attend his place of employment or education, unless the inmate performed some action subsequent to his approval for the program indicating that he might pose a danger to the safety of the community.

4. Therefore, I believe that defendants have shown nothing to justify alteration or amendment of this Court's order of October 14, 1977.

5. Upon information and belief it was not the policy and practice of defendants in August, 1977 to disallow temporary release participants a full measure of participation in the temporary release program, including daily release to attend work or school, unless they were believed to have performed some action, subsequent to their approval for the temporary release program, indicating that their continued release was

no longer appropriate or consistent with the safety of the community.

6. The sources of this information and belief, as more fully described in the accompanying memorandum of law, are the statutory provisions governing the temporary release program, documents given to temporary release participants including memoranda of agreement signed by temporary release participants and program manuals provided at the work release facilities, and conversations with numerous temporary release participants and Department of Correctional Services personnel who administer the temporary release program.

7. Executive Deputy Commissioner Lewis Douglass stated at a conference held herein on October 14, 1977, that the superintendents of the work release facilities may be affected in the exercise of their discretion regarding plaintiffs herein, by knowledge of the decisions made by defendants on or about August 25, 1977, revoking plaintiffs' temporary release status. I believe that to afford plaintiffs the opportunity to be treated in the same manner as they would have been treated in August, 1977, all references to these revocations, which have been found by this Court to have been unconstitutionally effected, must be expunged from plaintiffs' institutional records and not used or

considered in any way.

WHEREFORE, deponent respectfully requests that the Court:

I. Deny defendants' motion to alter or amend the judgment entered upon the order of October 14, 1977;

II. Lift the stay previously imposed upon said order;

III. Advise the defendants, by supplemental order or any other means the Court deems appropriate, that reinstating plaintiffs to the temporary release program does require defendants to assign each plaintiff to a facility designated as a work release facility; to release those plaintiffs who still have jobs or educational opportunities available, in order that they may attend their places of employment or education, under terms and conditions equivalent to the terms and conditions in the memoranda of agreement previously signed by these plaintiffs; and to afford a reasonable number of job search furloughs, equivalent in number and duration to the furloughs generally afforded persons approved for the temporary release program, to those plaintiffs who have lost their jobs as a result of the August terminations, or who had not located jobs as of August, 1977; and

IV. Order that all references to the decisions made on or about August 25, 1977 removing plaintiffs from the

temporary release program be expunged from plaintiffs'
institutional files and not used or considered in any way.

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SUSAN N. HERMAN

Sworn to before me this
day of October, 1977.

Pamela Parness
Notary Public

- 7 -

GENERAL RULES FOR EDGECOMBE CORRECTIONAL FACILITY INMATES

INTRODUCTION AND GENERAL LIVING GUIDE

Welcome to Edgecombe - congratulations - you were selected to participate in a community based program. This brings you an important step closer to the community. Gradually you will be faced with less external restrictions but with it you will have more responsibility. You will be in a test situation that will reveal how well you can use yourself. We hope your stay will work out to be helpful and productive.

As a pre-parole inmate, you are legally an inmate of the Department of Correctional Services and, therefore, subject to all standard rules of the Department.

The Edgecombe Program provides you with a unique opportunity to make the transition from institutional life to community parole via the Temporary Release (Work or Education) Program. Edgecombe has all the benefits of being a minimum security facility in New York City with job opportunities and family contacts close at hand.

Edgecombe staff will help you in achieving a satisfactory transition back to community life. However, each man can succeed only if he is willing to work at it himself. No amount of staff effort can be helpful if you choose not to develop a constructive parole program. The outcome is up to you. There are many other inmates waiting to have the same opportunity that you now have. As you succeed in achieving your parole goal, you will make room for the others you left behind upstate.

10- Edgecombe recognizes that inmates volunteering for our program. certain have already demonstrated ability to handle a furlough type of program, responsibly. Here, you will not be subject to the strict structure of ongoing confinement, but you will be obligated to participate in developing and working at a parole program you helped to plan. You will have ample opportunity for contacts outside the facility and visiting inside the facility.

Considering the above, it is, therefore, to your advantage that you and your fellow inmates understand and follow some basic rules which will make life at Edgecombe peaceful and comfortable for all.

Every inmate receives a copy of the GENERAL DEPARTMENT STANDARDS OF INMATES BEHAVIOR, AND EDGECOMBE CORRECTIONAL FACILITY RULES, which together govern conduct and program for all inmates. It is the responsibility of each inmate to observe the following living guide and Edgecombe Rules:

I EDGECOMBE PROGRAM AND LIVING GUIDE

ARRIVAL: Upon your arrival at Edgecombe, you will be assigned a room and bedding. The Security Unit Lt. or Sgt. will then orient you to the building and to the general building rules. Arrangements will be made, if needed, for a general physical examination by our medical staff.

On Friday of each week, a program orientation is generally held for all new arrivals. At this time, you will receive program information from the Senior Parole Officer about Edgecombe and you will have an opportunity to ask any questions.

Within two (2) or three (3) working days of your arrival at the facility, your Parole officer will interview you. He will review the Temporary Release Rules with you after which you will sign a memo of agreement consenting to observe the Temporary Rules and Regulations as covered by the law and by Edgecombe Rules. His main goal is to assist you in developing a suitable parole program for presentation to the Board of Parole.

II EDGECOMBE ORIENTATION AND FACILITY WORK PROGRAM

On the Monday following your arrival you will begin a facility work program lasting up to 3 weeks which will involve you in maintenance, repair and general upkeep of the building (this period may be extended depending on the need of the institution). You will also be required to perform such details, as required, during the week of your arrival.

The initial period at Edgecombe may be difficult and frustrating for you. During this period you will be required to work within the facility. You may feel it is a waste of your time to be here and to be restricted in your job seeking efforts. However, we have only 175 beds and to accommodate as many as possible this is the system that has been developed. You are expected to cooperate in keeping the facility clean and in good repair.

To coordinate the work assignment, every morning before 9:00 AM, the officer supervising the work details will call a shape-up meeting of clients who are in the building or on any restriction. At this meeting, work assignments will be made. Clients who do not report for shape-up will be in violation of the facility rules.

During this facility work period, your parole officer will work out with you your prospective work, educational or job search plan. Your parole officer will be the main resource if you need help in learning

Edgecombe Orientation and Facility Work Program (Cont'd)

how to look for a job, how to fill out an employment application, how to use community job placement and social service agencies, etc.. You will also have the opportunity to have representatives of some community agencies (e.g. Querer, Community On The Move, etc.) who may visit the facility and speak to you in a group to inform you of their programs.

III FURLONGS: On the second weekend after your arrival you will be eligible to be considered for weekend furloughs.

PRESENT FURLONG PROCEDURES: Shortly after his arrival at Edgecombe Correctional Facility, each inmate should fill out his Temporary Release Authorization (with his parole/counselor's help, if needed.) This should be made out in duplicate. It must contain the inmate's name, ID#, furlough address and telephone number, name and relationship of person with whom furlough is spent, inmate's signature and date of signature. Furlough dates will not be filled in by the inmate, but by the records office.

When the inmate has been at Edgecombe at least a week (there are no weekend furloughs for the first weekend of residence at Edgecombe), the inmate will receive from a counselor his copy of his weekend furlough paper, duly countersigned. This paper must be initialled by the parole/counselor before each weekend furlough.

This furlough authorization is valid (when duly initialled by the parole/counselor) for a period of two months (e.g., current furlough papers cover August and September). The inmate should keep this furlough paper for the period through which it is valid, presenting it to his parole/counselor for initialling before each furlough. The inmate should NOT give this furlough paper to Security when returning from furlough. He must keep

Weekend Furlough Procedures (Cont'd)

it, as described above.

(An inmate will, of course, surrender his furlough paper to an Adjustment Committee or Temporary Release Committee if instructed to do so.)

Weekend furloughs are guided by the following standard:

A - If you have less than 6 months to the Board and have blood relatives to spend weekends with, you may receive an overnight furlough every weekend. (Saturday morning until 9:30 PM Sunday night.)

B - If you have less than 3 months to the Board and are employed or attending school, and have blood relatives to spend weekends with, you may receive a weekend furlough that lasts from Saturday morning until after completion of your work or school program on Monday evening.

C - If you have more than 6 months to the Board and have blood relatives to spend weekends with, you may receive an overnight furlough every other weekend (from Saturday morning till 9:30 Sunday night.)

D - If you have no blood relatives to spend weekends with you may receive 14 daily furloughs on your eligible weekends to pursue constructive community activities.

~~Weekend furloughs are guided by the following standard:~~ This is instead of an overnight furlough.

Your parole officer is required to investigate your

Weekend Furlough Procedures (Cont'd)

proposed furlough address prior to your first weekend pass. You will not be permitted a pass until the residence has been checked and approved.

IV. TEMPORARY RELEASE PROGRAM

A - Work Search: Following completion of the facility orientation and in-house work program you will also be eligible to receive passes to look for employment. To do this, you will develop a job search plan with your counselor/parole officer during the first weeks at Edgecombe. Job search passes are issued for one day at a time and terminate at 3:00 PM each afternoon. When you return to the facility, your counselor/parole officer will discuss your job-seeking activities with you as well as plans for the next job search pass. At this time, you may be asked to submit written verification that you have kept your scheduled appointments. Based on an evaluation of your use of your job search pass and your ability to plan your next pass, the parole/counselor will authorize a new pass or have you remain in the facility until he can discuss your job-seeking activities and problems in more detail.

Requests for a work search pass should list the funds you need for work search on the day of your pass.

(See section # IX for details on processing out of building while on furlough or pass.)

B - Temporary Release Authorization and Contract: When you are successful in securing employment or arranging for an approved training program, you will

Temporary Release Authorization and Contract (Cont'd)

receive a contract, which furloughs you from the facility each day to go to work or to training. It will specify details of your job location, hours of release, etc., as well as your weekend furlough address. As soon as you know when the program is to start, you should return to Edgescombe to report your employment or training plan details to your parole officer. After your parole officer verifies your job or training, the contract will be prepared for you to sign.

YOU MUST NOT START WORK ON YOUR NEW JOB OR START TRAINING UNTIL YOU HAVE RECEIVED THIS CONTRACT

approved by the Superintendent and Temporary Release Committee. This contract specifies conditions and of confinement (the employment destination and the most direct route to and from that destination). Violation the bounds of confinement (places where you may visit or work) will result in an infraction report and a sanction.

Residents shall not alter their approved contract program without prior approval from the parole officer (this includes changes of time, change of employer etc).

Loss of your program (employment, training) or

interruption of the program by quitting your job, non-attendance, dropping courses at school or college, etc. must be discussed immediately with your parole officer.

C - Salaries (Stipend, etc.): You are required to return your salary, commissions or stipends over to the processing (admissions) officer each pay day in the form in which you received it (cash or check).

Don't wait to be asked. You will receive a written receipt for your salary check from the correction officer. This should be kept for your records.

Your salary will be credited to your personal savings account. This money should be helpful to you in making a more satisfactory parole adjustment in the community.

Failure to turn in your salary will result in an immediate restriction.

D - Other Responsibilities: Students, attending school or college are responsible for providing their grades, extra curricular activities, attendance and program information to their parole officer routinely and on request.

E - Violations While on Temporary Release: While on work search, furlough or on a temporary release program, the following are typical of some of the serious infractions of the release program:

Violation while on Temporary Release (Cont'd)

- 1) Failure to report arrests.
- 2) Knowingly consorting with individuals having an arrest record.
- 3) Engaging in illegal activity which includes using temporary release funds inappropriately.
- 4) Driving a vehicle without permission from the temporary release program.
- 5) Owning or driving a vehicle without Facility approval.
- 6) Use of alcohol or narcotics, or other illegal substances.
- 7) Returning to the facility late while on temporary release. In the event of an emergency lateness (e.g. serious accident, etc.), you are to contact your parole/counselor or Watch Commander. Ask him to make a record of your call and ask him for his name (this call does not automatically excuse you for coming back late).
- 8) Forging or altering your Temporary Release Document.

V. BOARD MEETING: You will be meeting the Board of Parole in New York City at Edgecombe.

Your parole officer will notify you as to the exact date. Be sure to arrange for time off from your job or school on the day that you meet the Board.

You will be notified of the Board decision either the evening of the Board hearing but no later than the following morning. Decisions of the Board are generally in three broad categories:

- A. Parole
- B. O.D.O.P. if your parole program is not completed
- C. Re-appearance before the Board at a later date

In this latter case, the resident may be permitted to stay at Edgecombe and will continue to receive the opportunity to use his time constructively in an open setting. Any benefits you may have accrued, such as a weekly weekend furlough, will be continued unchanged.

VI. FUNDS:

A- Work Incentive Allowance: This allowance at Edgecombe is uniform for all residents regardless of your previous work and incentive allowance received at other Correctional Facilities. All residents not in a work release program will receive the same incentive allowance daily. (See schedule list, item #8 for allowance.) This amount is credited to you from the day of your arrival until the date that you obtain a job.

If you have lost your job, you will begin receiving the incentive allowance from the day that you lose your job. When you obtain the new job, you will stop receiving the incentive allowance from the date you begin your new job.

B. ALLOWANCE FOR COLLEGE STUDENTS:

An educational allowance is given to residents attending college. This allowance replaces any incentive allowance for that day and must be used for all incidental costs (smudgies, haircuts, laundry, etc.) The number of days of daily allowance paid to students will be based on the number of credits for which the student is registered.

(See schedule list, item number 11 for details on this allowance and allowances for college registration, books, supplies, etc.)

C. RESIDENT INCOME:

All residents earning a salary or receiving a stipend, must turn this money over to the processing officer. Residents receiving a weekly budget of weekend furlough money, will have these amounts deducted from their resident account.

D. SPECIAL MONEY REQUESTS:

Inmates may send support payments to their families. These payments will be set up for a specific amount and must be scheduled on a weekly, bi-weekly or monthly basis. Support payments will be authorized only if you have sufficient funds to send continuous payments. If you lose your job, support payments will cease.

MEALS:

Three meals will be served daily in the cafeteria located on the basement floor.

Attendance at any meal is optional.

A current schedule of meal hours and cafeteria regulations is posted on each residential floor, bulletin board and in the cafeteria (serving, clean-up areas, etc.)

In addition to three regular meals, an evening snack is delivered to the floor daily.

Residents who are approved for work search or educational release pass and are not in the building during the hours when the cafeteria is open, will receive funds at the processing desk to cover lunch costs. (Educational release residents will receive lunch as per schedule list, item number 11). At the present, these funds are not generally charged against the resident's account. All residents earning a salary or stipend, who receive a weekly budget, will have their resident account charged for this amount.

III. FACILITY HOUSING UNITS:

The residents will not be permitted to sleep beyond 8:00 AM, except on Saturdays, Sundays, and Holidays, and except for those who work nights.

All residents will be responsible for keeping their bedside areas broom-clean and neat. Bedding on beds shall be made smooth and neat each morning and kept that way until bed time. Clothing shall be placed in lockers and will not be hung on radiators.

All this shall be accomplished before leaving the building on a work search pass or memorandum of agreement, or before undertaking in-house work details.

Cleaning details for other than the residents own living space will be assigned by the correction officer on the 4:00 PM to Midnight shift. Assignments shall be posted on the bulletin board.

Correction staff will inspect the details to make certain that they have been completed.

Failure to complete details properly may result in an infraction report and can seriously affect your furlough privileges and status in the program.

On Friday evening, each floor unit will have a general house cleaning.

Daily routine (MONDAY through FRIDAY)

Wake up time at Edgecombe is at 6:30 AM.

Quiet time is at 11:00 PM. This also means that there will be no visiting in the rooms and personal portable radios on the floor and T.V.'s will be turned off at that time.

Lights out promptly at midnight. Only residents who are stu-

dents in the educational release program may study without restriction in the study room. (See schedule List #9 for location) Remember, that students are still responsible for following rules on wake-up, work details, for maintaining their schedule attendance at classes, and keeping their living spaces neat and broom-clean.

- H. ENERGY CONSERVATION: To conserve energy all lights, radios, etc. should be turned off when you are not in your room and before you fall asleep.
- I. MONEY: For your security, cash is not permitted on the residential floors. Money shall be kept in the processing room locker.
- J. CLOTHING: Only green institution clothing will be worn while in the building. Civilian shirts may be worn, optionally. All civilian clothes will be stored in the basement floor processing room locker.
- K. LAUNDRY: Laundry facilities are currently not available in the building. Personal laundry may be handled in the wash basin or while on regular furlough in any outside laundry. The administration is currently requesting that laundry machines be made available in the building for the use of our residents. This may be some time in coming, so please have patience.
- L. STATE PROPERTY: Residents are expected to care for all state property assigned to them or which they have occasion to use. State property is not to be abused or destroyed or lost.

M.

PERSONAL BELONGINGS: Except for personal belongings that can be stored in the residents lockers, all excess personal items should be removed from the building as soon as a parole residence has been established. Usually at the time of the first weekend furlough. All previously held personal property should be requested from the Principal Corrections Clerk as soon as possible, if within limits of the Temporary Release Program. No storage space is available in the building. Each resident is expected to exercise care for the safety and security of his own personal things. The Facility Administration cannot be responsible for the security of personal items. You will be asked to sign a statement that you understand the limits of the State's responsibility and your responsibility in this matter.

- IX. PROCESSING ROOM: This room is located on the basement floor. All residents will depart on temporary release or work search and return to the facility through the processing room.
- A.. All newly arrived residents will be assigned a numbered processing room locker, and will be given a lock to protect their civilian clothing and secure their personal belongings.
 - B. Before leaving the building residents must have available the necessary passes for job search or memorandums of agreement for work release, education release or community release.
 - C. When the resident enters the processing area, the correction officer will check that there is proper authorization to leave the building and that no restriction exists. (Use of the restriction form will result in the removal of the resident's Identification Card to the Lieutenant's Office. Issuing of another restriction form will also be used to lift the restriction so that the Identification Card can be returned to the processing room area). If a resident's papers are not in order, he should be sent to the Master Control waiting room area until the Watch Commander can clarify the situation.
 - D. The resident will proceed to the right side of the room, place their institutional greens on the numbered clothes hook or container that corresponds with the metal locker number.
 - E. After placing the green clothing on the hook or in the container, the resident will move to the desk in the mid-

dle of the room, naked, where he will be observed by a correction officer.

- F. After the frisk and/or observation, the resident will go to his locker and dress in his civilian clothes.
- G. Fully dressed, the resident will return to the desk where a correction officer will again check his temporary release papers and then issue monies (tokens and/or check or cash) authorized by the program staff.
- H. Only after this final verification will the resident be given his Identification Card at which time he will exit from the building.
- I. Upon his return from temporary release, the resident will empty his belongings into the metal baskets at the exit door then proceed through the metal detector if available into the processing room and reverse the procedure stated in sections D, E, F, and then G.
- J. Contraband such as alcohol, controlled substances, incense, drugs, and weapons (any objects that can be used as weapons) will not be permitted in the building. All contraband will be confiscated and the resident will be given a receipt. An infraction notice will then be prepared.
- K. Cameras, tape recorders or other recorders; cassettes players and radios with recording devices are not allowed in the facility. Radios and tape players without recording devices are permitted in your room at your risk. Caution is urged to prevent the loss of your possessions by ^{locking} placing them in

your processing room locker as the State cannot take responsibility for any items that may be missing.

- L. Strip frisks will be performed whenever security feels it is necessary for the safety and security of the building.
- M. Inspection of lockers and residents' rooms may be made at any time for the safety and security of the facility. At least two officers should be present at such an inspection.
- N. All monies and tokens not used will be left in the resident's locker in the processing room. Money will not be permitted on the residents' floors, in order to discourage the loss of personal funds.
- O. Money in excess of the client's weekly budget which is brought into the facility by the resident will be placed in an envelope and delivered to the Captain with immediate notification to the parole staff. The client will receive a receipt marked "excess money". Authorization for the disposition of these funds will be made by the Senior Parole Officer and documented for the record.
- P. Use of illegal drugs is forbidden. Evidence of alcohol use is also not condoned.
- Q. Employed residents and those receiving training stipends (e.g., O.V.R., V.A., etc.) must turn in this money in full to the processing area correction officer on the day he is paid.

There are no exceptions to this rule. Residents receiving pensions, compensation and other such mon^{ies} shall turn in these funds to the correction officer to be credited to his personal facility account. Receipts will be given to the resident by the correction officer.

X. SICK CALL: The ~~infirmary~~ location and the sick call schedule is posted on every bulletin board and on each of the resident's floors and the other public notice bulletin boards in the building.

In order to see the doctor, the resident will first be seen by the nurse in the Nurses' Station, who is available at specific hours, daily. Hours are posted on the Nurses' door. If an appointment is indicated, she will tell the patient the appointment time with the doctor. The nurse will, of course, have consulted with the doctor on all cases that she has screened.

MEDICAL EMERGENCIES will be handled immediately.

XI. BEHAVIOR: Behavior in and around the building perimeter that violates the safety of individuals or property, or the security of the building, will not be allowed. This includes jostling, physical harassment or verbal harassment of other residents or staff that may affect the safety of the individual. Also smoking is not permitted in the resident's room.

XIII. PRISONER'S PROPERTY: The necessity to keep your personal property under lock and key is essential. Valuables should not be brought into the facility. Excess personal property that cannot be stored in your assigned lockers will be given to you for removal from the building once you have an approved paroled residence.

XIII. COUNT TIME: This will take place five times a day. The count schedule is posted on all residence bulletin boards. In addition to the count time, there will be a shape up period in the morning during which time residents will receive their work detail assignments during the in-house work period, or while restricted to the building. With reference to the count time, all residents must remain in their rooms during the count on the unit. When in other areas, as for example, being counseled in the parole office, the resident must stay in the area until the count is cleared. The parole officer will, of course, notify the processing room area that he has a client sitting at his desk.

XIV. VISITING:

- A. Visiting is encouraged in the building for persons on the residents visiting list. Visiting takes place in accordance with schedules posted on all resident's floor bulletin boards.
Visitors must show their identification and fill out a visiting slip each time they visit. They must also have their signature on the visiting card.
- B. Packages brought in by visitors will be inspected for contraband. All food items brought in by visitors will be for consumption in the visiting room. Food items remaining at the end of the visit will not be permitted on the residential floor in order to avoid a vermin problem.

XVI. CLIENT COUNCIL: A client council to represent the needs of the residents to the administration is encouraged. Resident representatives will be heard on any problem. Signed requests should be submitted in writing by the client council to the Program Coordinator for review and processing according to procedures. A suggestion box may also be made available for informal communication of problems needing attention.

* Currently under development.

XVII Institutional Grievance Resolution Committee

SCHEDULES

I.

1. Board of Parole Monthly Hearing - generally the second Wed. of each month.
2. All special requests for funds to the program staff require at least three working days advance notice.
3. Meal schedules: breakfast from 7:00 AM to 7:30 AM
lunch from 11:30 AM to 12:00 noon
dinner from 4:30 PM to 5:00 PM
late dinner from 8:30 PM to 9:30 PM
(an admission card must be picked up from the processing from correction officer.)
4. Daily routines: (Monday through Friday)
Wake-up 6:30 AM
Quiet time 11:00 PM
lights out 12:00 midnight
5. Sick call schedule: (Nurses' Station, Room 111)
Day schedule from 10:00 AM to 10:30 AM.
Evening Schedule from 6:00 PM to 7:30 PM.
6. Linen change schedule: Tuesday - pick up begins at 5:30 AM.
7. Family visiting: Weekends and Holidays only-from 1:00 PM.
8. The incentive allowance for all unemployed clients, except those on educational release, is 60 cents per day.
9. Study Room (located on the 1st floor, Center), unlimited use for college students.
10. Money Requests:
 - A. Money requests for weekly budgets must be in the Business Office by 10:00 AM, Monday, of each week.

Checks for the weekly budget will be available every Tuesday morning.

- B. Money requests for dependent payments must be set up for a specific amount and shall be scheduled on either a weekly, bi-weekly, or monthly basis.
- C. Money requests for exceptional needs should allow two full working days for processing.
- D. Approved furlough requests must be in the business office by 10:00 AM on Wednesday so that funds may be issued to you on Friday morning. Late requests will not be honored.
- E. Your parole officer must report your change of status to the business office on the next day after it occurs. These changes affect the amount of funds you will be issued.
- F. Job seeking money requests should list funds needed on each day funds are requested. (e.g., a request turned in on Monday night will not be ready until Wednesday morning for the pick up in the processing area)

1. COLLEGE ALLOWANCE: The standard for receiving these funds are:

CREDIT HOURS

ALLOWANCE

9 or more

5 days at \$1.95 per day

4 to 8 hours

3 days at \$1.95 per day

3 hours or less

3 days at \$1.95 per day

This would be so even if the inmate were attending school three days a week in order to attend one class. In those cases where the inmate is attending school, but not receiving educational release allowance for the full five days, he will be paid an Incentive Allowance at Grade 2, Step 2 or (\$.60 per day) for the number of days that he is not receiving the educational release allowance. On days the inmate is not attending class, which includes orientation periods and intersessions, the inmate will be paid the incentive allowance rate.

In addition to the allowance, educational release inmates will receive daily carfare, as needed, a box lunch, college approved books and supplies required of all students, registration, and or tuition fees and incidental expenses as may be needed to facilitate their programming.

Receipts must be turned in for all expenses with the exception of carfare and incidental expenses (e.g., haircuts, etc.). If an educational release inmate has a part-time job, he will be required to pay expenses of meals and transportation only. The State will pay the cost of tuition, liability fees and textbooks. If the educational release inmate has funds or could be expected to obtain financial assistance from outside sources, he will be required to bear all expenses connected with participation in the

INTRODUCTION AND GENERAL LIVING GUIDE

Welcome to Bayview! We hope your stay here will be helpful and and productive. As pre-parole inmates, you are legally inmates of the Department of Correction and are subject to all standards and Rules of the Department.

The voluntary Bayview Program provides you a unique opportunity to make the transition from prison life to community parole via the temporary release (work or education) program. Bayview has all the benefits of being a minimum security facility in New York City with job opportunities and family contacts close at hand.

Bayview staff will help you in achieving a satisfactory transition back to community life. However, each man can succeed only if he is willing to work at it himself. No amount of staff effort can be helpful if you choose not to develop a constructive parole program. The outcome is up to you and there are many prospective inmates waiting to take your place should you default in the program.

Bayview recognizes that inmates volunteering for our program have already demonstrated ability to handle responsibility on a furlough type of program. Here you will not be subject to the strict structure of ongoing confinement, but you are obligated to participate and work at program.

You will have ample opportunity for contact outside the facility and visiting inside the facility.

It is, therefore, to your advantage that you and your fellow inmates obey some very basic rules which will make life at Bayview peaceful and comfortable for all.

Every inmate receives copies and is responsible for observing

temporary release committee, or adjustment committee, counseling session, or work assignment at appointed time. CLASS B-C.

32. Inmate leaving or attempting to leave Bayview without authorization (I.D. Card, pass, note of agreement, run) while on restriction is an escape. CLASS A-B-C.

ARRIVAL: Upon your arrival at Bayview, you will be assigned a room and clothing. The Security Unit Lieutenant or Sergeant will then orient you to the building and to the general building rules. Arrangements will be made for a general physical examination by our Medical Staff.

On Friday of each week, a program orientation is generally held for all new arrivals. At this time, you will receive program information from the Senior Parole Officer about Bayview and you will have an opportunity to ask any questions.

Within two or three days of your arrival at the facility, your parole officer will interview you. His main goal is to assist you in developing a suitable parole program for presentation to the Parole Board.

- I. BAYVIEW PROGRAM: On Monday following your arrival, you will begin a two-week facility work program which will involve you in the maintenance, repair and general upkeep of the building. During this time, you will work with your parole officer on your prospective work, educational or job search plan. Your parole officer will be your main resource if you need help in learning how to look for a job, how to fill out an employment application, how to use community job placement and social service agencies, etc. You will also have the opportunity to have representatives of some community agencies (eg. Querer, Community-on-the-Move, etc.)

... speak to you in a group to inform you of their programs.

III. FURLONGHS: Following completion of the two week facility work program, you will be eligible to be considered for weekend furloughs, as follows:

- A. If you have less than six months to meet the Board and have blood relatives to spend weekends with, you may receive an overnight furlough every weekend.
- B. If you have more than six months to meet the Board and have blood relatives to spend weekends with, you may receive an overnight furlough every other weekend.
- C. If you have less than six months to meet the Board and have no blood relatives to spend weekends with, you may receive day furloughs every weekend to pursue constructive activities.
- D. If you have more than six months to meet the Board and have no blood relatives to spend the weekends with, you may receive day furloughs every other weekend to pursue constructive activities.

Your parole officer is required to investigate your proposed furlough address prior to your first weekend pass.

Following completion of the two week program, you will also be eligible to receive passes to look for employment. To do this, you request a pass from your parole officer and indicate on it the specific place you plan to visit and the number of tokens needed for the trip or trips. The cost of tokens will be charged to your account. Each afternoon when you return, your parole officer will review with you the result of your visit.

Passes will be approved depending on the need, the suitability of your request and based on how you handle previous passes.

If your pass requires that you be out during lunch time, you will receive either a lunch bag or \$1.65 to purchase lunch with, which at the present time is not charged to your account.

You will be expected to stay within the bounds of confinement as specified on your pass. If an agency to which you were sent for employment assistance sends you to another employment contact (and this can be checked) it would constitute the bounds of confinement unless the location had been previously set as off limits.

IV. WORK RELEASE: When you are successful in securing employment, you will receive a memo of agreement, which furloughs you from the facility each day to go to work. As soon as you are hired, you should return to Bayview to report your employment to your parole officer. After your parole officer contacts your employer and verifies your job, he will prepare a memo of agreement. You must not start work on the new job until you have received your memo of agreement. This agreement specifies conditions and bounds of confinement. Violating the bounds of confinement (places where you may visit or work) will result in sanctions.

You are required to routinely turn your salary over to the Admissions Officer each day in the form in which you received it (cash or check). Don't wait to be asked. You will receive a written receipt from the Correction Officer. Your salary will be credited to your personal account. This money should be helpful to you in making a more satisfactory adjustment in the community.

On written approval of your parole officer, you may withdraw limited funds from your account. Amounts in excess of \$5.00 must be countersigned by the Senior Parole Officer. Amounts for special purchases must be supported by paid receipts.

Any money you owe the State for carfare, etc., will be deducted from your salary check at a rate not to exceed 25% of any check.

Loss of your program (employment, training) or interruption of the program by quitting your job, non-attendance, dropping courses at school or college, must be discussed immediately with your parole officer.

While on work search, furlough or temporary release program, the following are typical of serious infractions of the Release Program:

- a) failure to report arrests
- b) knowingly consorting with individuals having an arrest record
- c) engaging in illegal activity which includes using temporary release funds inappropriately. Driving a vehicle without permission from Temporary Release Program.

V. BOARD MEETING: You will be meeting the Board of Parole in New York City. At that time, you will wear your institutional green clothing.

Your parole officer will notify you as to the exact date.

Security staff at Bayview will take responsibility for arranging your transportation to and from the Parole Board hearing. Be sure to arrange for time off from your job on the day you meet the Board.

You will be notified of the Board's decision first thing the following morning. Decision of the Board is generally in three Board categories:

a) Parole as soon as possible, b) if parole is not complete, c) reappearance before the Board at a later date. In this case, residents may stay at Bayview which would continue to give you the opportunity to use your time constructively in an open setting. Any benefits you may have accrued, such as a weekly weekend furlough, will be continued unchanged.

VI. FUNDS: The work incentive allowance at Bayview is uniform for all residents. Regardless of your previous work incentive allowance at other Correctional Facilities, you will receive fifty-five cents daily while at Bayview. This amount is credited to you from the day of your arrival up until you start to work. Upon being paroled, you will be oriented to your responsibilities while on parole. You will then receive a check covering all the money remaining in your personal account less funds ^{deducted} for carfare and for the approved cash requests you received. Also a check from the State in the amount of \$40 will be given to you by your parole officer. Parole clothing made available to you upstate is yours to keep.

The incentive allowance is only for work release residents during the two week work program and during the job search. Full-time college students do not receive the incentive allowance. However, they do receive carfare and lunch as needed, college approved books and supplies required of all students, registration and/or tuition fees and incidental expenses as may be needed to facilitate their program. Receipts must be turned in for all such expenses except for lunch and routine carfare. Students are responsible for providing grades, extra curricular activities and attendance information to the parole officer routinely, and on request.

VIII. FACILITY HOUSING UNITS:

- A). Residents will not be permitted to sleep beyond 8:00am except during Saturdays, Sundays and holidays.
- B). All residents will be responsible for keeping their rooms clean and neat, bedding on beds shall be made smooth and neat each morning. Clothing shall be placed in lockers and will not be hung on radiators.
All this shall be accomplished before leaving the building on a pass or memo of agreement or before undertaking in house work details.
- C). Cleaning details will be assigned by the Correction Officer on the 4:00pm-Midnight shift to those areas, other than the resident's own room. Assignments shall be posted on the bulletin board.
- D). Correction Officers will inspect the details to make certain they have been completed.
- E). Failure to complete details properly may result in an infraction report and can affect your furlough.
- F). On Friday evening each floor unit will have a general house cleaning.
- G). Daily routine (Monday to Friday)
Wake Up Time At Bayview is at 6:30am
Quiet Time is at 11:00pm. This also means there will be no visiting in the rooms and personal audible radios on the floor and TV will be turned off at that time.

Lights Out promptly at midnight. Only residents who are students in the Educational Release Program may keep their lights on to study without restriction. These students are still responsible for following rules on wake up, work details, maintaining their scheduled attendance at classes.

- H). Energy Conservation: To conserve energy all lights, radios, etc. should be turned off when you are not in your room and before you fall asleep.
- I). Money: For your security no cash is permitted on the residential floor.
- J). Clothing: Only green institutional clothing will be worn while in the building. All civilian clothes will be stored in the first floor processing (locker) room.
- K). Laundry: Laundry facilities are available on most floors. Residents wishing to wash civilian clothes must check with the floor Correction Officer for permission to do so during scheduled hours posted on the bulletin board. Once the clothes are washed and/or dried, they are to be returned to the first floor processing (locker) room immediately.
- L). State Property: Residents are expected to care for all State property assigned to them or which they have occasion to use. State property is not to be abused or destroyed or lost.

- IX. Processing Room: This is located on the first floor next to the stairway. All residents will depart on temporary release and return to the facility through the processing room.
- A). All newly arrived residents will be assigned a processing room locker and a combination lock to protect their civilian clothing and secure their personal belongings.
 - B). Before leaving the building, residents must have the necessary temporary release papers for job search, work release, educational release or community release.
 - C). When the resident enters the processing area, the C.O. will check that there is proper authorization to leave the building and that no restriction exists.
 - D). The resident will proceed to the right side of the room, hang their institutional greens on the numbered clothes hook that corresponds to the assigned metal locker number.
 - E). After hanging the green clothing on the hook, the resident will move to the desk in the middle of the room in their underwear where he will be frisked by a Correction Officer.
 - F). After the frisk, the resident will go to his locker and dress in his civilian clothes.
 - G). Fully dressed, the resident will return to the desk where the Correction Officer will again check his temporary release papers and then issue necessary monies (tokens and/or cash) authorized by the Parole Officer on a pass request or memo of agreement.

from the building onto 20th Street.

- I). On return from temporary release, the resident will empty his belongings into the metal baskets at the exit door, then proceed through the metal detector into the processing room and reverse the procedure stated in sections #D, E, F, and then G.
- J). Contraband such as alcohol, controlled substances, incense, drugs and weapons (any objects that can be used as weapons) will not be permitted in the building. All contraband will be confiscated and the resident will be given a receipt.
- K). Cameras and tape or other recorders: Cassette players and radios with recording devices are not allowed in the facility. Radios and tape players without recording devices are permitted in your room at your own risk. Caution is urged to prevent the loss of your possession by placing them in your locker as the State cannot take responsibility for any items that may be missing. This is especially for residents who abscond and leave their belongings at risk.
- L). Strip frisks ordered by the Supervisor will only be performed whenever the security feels it necessary for the safety and security of the building.
- M). Inspection of lockers and resident's room may be made at any time for the safety and security of the facility.

- M) All monies and tokens not used will be returned to the correction officer on duty. He will place the money in an envelope marked with the resident's name and B# and place it in the safe. It will be returned to the resident on his next furlough. The C.O. will record the amount in his record. Money will not be permitted on the residence floor or in the resident's locker in order to discourage the loss of personal funds.
- O) Use of illegal drugs is forbidden. Evidence of alcohol use is also not condoned.
- F) Money in excess of \$20.00 brought in by the resident will be placed in an envelope and delivered to the Captain with immediate notification to the parole staff. The client will receive a receipt marked "excess money." Authorization for the disposition of these funds will be made by the Sr. Parole Officer and documented for the record.
- Q) Employed residents and those receiving program and stipend must turn in this money in full to the processing area C.O. the day he was paid. There are no exceptions to this rule. Residents receiving pensions, compensation and other such monies addressed to Bayview, shall turn in these funds to the CO to be credited to his account. Receipts will be given to the resident by the CO.

Residents must remain in rooms during the count on the unit.

When in other areas (seminars, counseling in the P.O. Office) they must stay in the area until the count is cleared.

XV. VISITING: Visiting is encouraged in our second floor visiting room for persons on the residents' visiting list. Visiting takes place daily in accordance with a schedule posted on all resident floor bulletin boards.

SCHEDULES

- 1) BOARD OF PAROLE MONTHLY MEETING - 2ND WEDNESDAY OF EACH MONTH
- 2) .ALL REQUESTS FOR CASH FUNDS FROM YOUR PAROLE OFFICER REQUIRES AT LEAST THREE (3) DAYS ADVANCE NOTICE.
- 3) MEAL SCHEDULE:

BREAKFAST:	FROM 7:00	TO 8:00
LUNCH	11:30	12:00
DINNER	5:30	6:30

- 4) DAILY ROUTINE: (MONDAY - FRIDAY)

WAKE-UP	6:30 A.M.
QUIET TIME	11:00 P.M.
LIGHTS OUT	12:00 P.M.

- 5) SICK CALL SCHEDULE:

DAY SCHEDULE:	8:00 - 8:30 A.M.
EVENING "	5:00 - 5:30 P.M.

- 5a) GYMNASIUM:

6:45 - 9:30 P.M.

- 5b) SWIMMING POOL:

6:45- 9:30 P.M.

- 6) Linen change schedule:

Monday Pick-up 10:00 A.M.

- 7) Family Visiting:

Weekdays: 6:30 - 9:00 P.M.

Weekends: 9:00 A.M.-3:00 P.M.

PERMISSIBLE
SANCTION

BAYVIEW RANGE OF DISPOSITION FOR CLASS A-B-C- MISBEHAVIOR

CLASS OF MISBEHAVIOR:

- A. Serious misbehavior which constitute a danger to life, health, security or property or deliberate failure or refusal to follow the guidance and counseling of the adjustment committee.
- B. Misbehavior which does not constitute a danger to life, health, security or property or deliberate failure or refusal to follow the guidance and counseling of the Adjustment Committee.
- C. Less serious misbehavior

SUPERINTENDENT'S PROCEEDINGS - CLASS A & B DISPOSITIONS

1. Reprimand - (written up by the correction officer for inmate record, infraction report, etc.) (CC to Watch Commander C.O., P.O. Supt.).
2. Counselling - (written up by parole officer and or correction officer for Inmate Record (CC to Watch Commander C.O., P.O., Supt.)
3. Loss of One or more specified privileges for a specified period (includes but not limited to loss of week-end furlough 1-8 weekends) also recreation privileges i.e. pool, gym, TV)
4. Temporary or Permanent Change of Program:
Includes:
 - a). Restriction to Bayview Facility 0-60 days
 - b). Reduction, suspension or revocation of work search pass or memo of agreement for Educational and work release activities
 - c). Extra facility work detail
 - d). Transfer to a medium or maximum security facility for re-programming
 - e). Issuance of abscondance warrant after inmate 5 hour AWOL
5. Restitution for Loss of or Intentional Damage to State Property to be made from existing or future funds standing to the credit of the inmate.
6. Loss of a specified period of good behavior allowance (good time) subject to restoration as provided in Chapter V.

CLASS A & B MISBEHAVIOR

7. Referral to the Adjustment Committee for such action or further action as may be deemed appropriate by the committee (within the limits of the action the committee is authorized to take).

8C. LESS SERIOUS MISBEHAVIOR

CLASS C DISPOSITION

Adjustment Committee:

1. Guidance, counselling, warning, reprimand.
2. Loss of one or more specified privileges for a specified period not exceeding 30 days.
3. Confinement to his cell or room continuously or on certain days or during certain hours for a specified period up to, but not exceeding two weeks.
4. Where the inmate's behavior is such that his presence in a general housing unit disrupts the order of that unit or is inconsistent with the best interests of the facility or of the inmate, confinement in a special housing unit; provided, however, that in such case the Adjustment Committee shall immediately recommend to the Superintendent that a Superintendent's proceeding be held.
5. Where the committee imposes a restriction upon the activities of an inmate, it may direct that the inmate appear before it at a specified time during the period of the restriction to determine whether there has been any change to the attitude of the inmate that would tend to assure his future cooperation with the policies of the Department.

Where the committee is of the opinion that such a change has occurred, it may discontinue the restriction or restrictions imposed or any portion thereof.
6. The committee may at any time defer action or further action with respect to an inmate for a period of up to three months. In such cases the inmate shall be advised that his behavior is subject to continuous appraisal by the committee and that further action may be taken if his behavior does not improve.

CHART II

LIST INDICATING BEHAVIOR PROHIBITED IN BAYVIEW & CLASSIFICATION FOR EACH

1. Inmate refusal to participate construct vely in Bayview Facility maintenance work program - Class B-C.
2. Inmate failure to report arrests, knowingly consorting with persons with a criminal record, engaging in illegal activity (including inappropriate use of Temporary Release funds) or driving a motor vehicle without authorization of the Temporary Release Committee--Class A-B-C.
3. Inmate failure to return to Bayview on time as specified by pass, furlough, or memo of agreement--Class B-C.
4. Inmate failure to stay within the bounds of confinement on work search, other type of pass, furlough or memo of agreement--Class A-B-C.
5. Inmate failure to report to Parole Officer the loss or interruption of program, eg. loss of employment, cancellation or dropping of education or training courses--Class B-C.
6. Inmate working or going to school ^{on} Memo of Agreement--Class A-B-C.
7. Inmate failure to turn in the full salary or stipend as received, check or cash, on payday (Sec. 857 Correction Law) Class B-C.
Inmate failure to turn in documents or verification, i.e. receipts for items purchased, training reports, school and college transcript, grades, etc. Class B-C.
8. Inmate taking unauthorized food items to the resident floors Class C.
10. Residents sleeping in bed past 8:00 am without written permission (exceptions, medical bed rest patients, night time employed inmates) Class B-C.
11. Inmate failure to keep room clean and neat, (rooms must be swept daily, trash and ashes emptied, clothes hung in lockers, bed made and personal items neatly arranged), once a week floors will be stripped, waxed, buffed and windows and walls cleaned. Class B-C.
12. Failure to complete assigned personal (see 10) or facility maintenance work detail--Class B-C.
13. Inmates are not permitted to visit each others rooms after 11:00 p keep lights on after 12:00 am, or play radios, TV's, tapes or record players after 11:00 pm--Class B-C.
14. Inmates are not allowed to gamble or have possession of money, tokens, e.c., within the facility residence--Class B-C.

15. Inmates will wear only State green uniforms inside Bayview. No civilian clothes may be worn or in your possession in the building. State green uniforms cannot be worn outside the building unless you are on a work detail. CLASS A-B-C.
16. Inmates must secure permission from the floor correction officer to wash civilian clothes which when dried must be returned to the Processing Areas Locker - CLASS B-C.
17. Inmates are not permitted to misuse or destroy or mutilate or alter state property including clothing, identification cards, remos of agreement, passes, furniture, etc. - CLASS A-B-C.
18. Inmates cannot refuse a direct order or work assignment i.e. authorized body search, cell frisk, property search etc. CLASS A-B-C.
19. Inmates are forbidden to possess, use or sell contraband items e.g. Drugs controlled substances, alcohol, weapons, such as guns, clubs knives etc., or any object which can be used as a weapon CLASS A-B-C.
20. Inmate loss of Remo of agreement, pass or ID card. CLASS B-C.
21. Evidence of contraband, use i.e. alcohol breath, positive drug urinalysis, bizzare or violent physical behavior. CLASS B-C.
22. Inmate possession of Stolen property, is not permitted. CLASS B-C.
23. Inmate possession of camera or electronic recording devices is not permitted. CLASS B-C.
24. Inmate smoking in bed is not permitted. CLASS B-C.
25. Inmate harrassment, Jostling, physical or verbal threats or assaultive or violent acts against other inmates or staff is forbidden. CLASS A-B-C.
26. Inmate failure to keep appointments with Bayview staff, Temporary Release Committee, Medical, Dental, Adjustment Committee or outside job, educational or social agencies. CLASS B-C.
27. Unauthorized inmate use of facility telephone. CLASS B-C.
28. Inmate modification of Temporary Release program without Temporary Release Committee approval. CLASS B-C.
29. Inmate entering parole office, business office or other restricted areas without prior authorization (specific appointment). CLASS B-C.
30. Inmate yelling, spitting or throwing objects out of facility windows to visitors or passersby. CLASS B-C.

PRISONERS' LEGAL SERVICES OF NEW YORK

100 Church Street
New York, N. Y. 10007
(212) 285-0370

Pierce Garety, Jr.
Executive Director

COPY OF WRITING PAPER
RECEIVED
DEPARTMENT OF LAW

NOV 2 - 1977

NEW YORK CITY OFFICE

November 1, 1977

Hon. Morris E. Lasker
United States District Judge
United States District Court
United States Courthouse
Foley Square
New York, New York 10007

Re: Tracy v. Salamack, 77 Civ. 3937 (MEL).

Dear Judge Lasker:

We have received today the affidavit of Martin Horn, submitted by defendants to seek clarification of the effect of the preliminary injunction issued herein on October 14, 1977.

This letter constitutes plaintiffs' response to the questions defendants pose.

Question #1. "Must the plaintiff class inmates be returned to the same facilities from which they were removed on August 25, 1977?"

Response. No, not necessarily.

Plaintiffs should be returned to the same facilities insofar as those facilities are still in operation. Where placement at the same facility is not feasible due to the facility having been closed or due to overcrowding at a particular facility, each plaintiff should be assigned to a facility designated as work release facility, comparable to the facility at which he resided in August, 1977, and in the same area.

To the extent that choices must be made in assigning inmates to the same facility, inmates who currently have employment or educational opportunities open to them should be given priority in placement at an institution convenient to their job or school.

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Re: Tracy v. Salamack
November 1, 1977
Page Two

Question #2. "If the answer to the foregoing question is yes, must the Department open the closed work release programs just for these inmates?"

Response. No, provided that there are sufficient positions in the work release facilities now open to accommodate the plaintiffs in a manner substantially similar to their situations prior to August 25, 1977.

Question #3(a) "If the inmates need not be returned to the very same facility from which they were removed must the inmates removed from New York City facilities be returned to work release facilities in New York City?"

Response. Yes.

Question #3(b). "If the answer to the foregoing is yes, when and for how long each day should they be released on job search furloughs?"

Response. Plaintiffs should be afforded a reasonable number of job search furloughs equivalent in number and duration to the furloughs generally afforded persons approved for the temporary release program. Those plaintiffs who still have work or school placements available should be released under the terms and conditions the same or substantially similar to the terms and conditions imposed by the memoranda of agreement previously signed by these plaintiffs, including release each work day for a sufficient time to permit these plaintiffs to attend and to travel to and from their places of employment or education.

Question #4. "Must these inmates be permitted weekend family visit furloughs? If so, when and with what degree of frequency?"

Response. Yes, plaintiffs must be permitted to apply for weekend furloughs, and must be afforded weekend furloughs equivalent in number and duration to the furloughs generally afforded temporary release participants. Plaintiffs believe that weekend furloughs are routinely granted to temporary release participants who have work or school placements. The remaining plaintiffs, who are seeking employment or

Hon. Morris E. Lasker
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educational opportunities, must be afforded fair consideration of their applications for weekend furloughs by the Superintendent of their facility.

Question #5(a). "Are the plaintiff class inmates to be reinstated subject to the same terms and conditions as existed prior to August 25, 1977?"

Response. Yes, plaintiffs believe that the order previously entered herein so specifies and so requires.

Question #5(b). "If so, at what point in time would they become subject to new regulations?"

Response. Plaintiffs agree to abide by new departmental regulations governing their own behavior on temporary release and at the work release facilities, in order to avoid the situation defendants describe where different inmates at a facility would be subject to different internal regulations. However, plaintiffs may not be removed from the program on the basis of a reevaluation of their prior criminal or institutional records.

It is interesting to note that defendants no longer contend that it was their policy and practice prior to August 25, 1977 to reevaluate temporary release participants on the basis of their prior criminal or institutional records, or on the basis of their "dangerousness" in the abstract. This court has already held that plaintiffs are entitled not to be removed from the temporary release program except under such terms and conditions as would have impelled their removal prior to August 25, 1977. Defendants now indicate that a new mechanism has been added to permit removal for other reasons. Whatever policy and practice defendants adopt after September 1, 1977 regarding reevaluation of eligibility does not affect the reasonable expectation or entitlement of the present plaintiff class. Being subjected to a new ground for revocation, in contravention of their reasonable expectations, is precisely what plaintiffs sought to prevent in applying for the preliminary injunction herein.

Hon. Morris E. Lasker
Re: Tracy v. Salamack
November 1, 1977
Page Four

Question #6. "In the upstate facilities, must the plaintiff class inmates be housed with other work release inmates regardless of whether they are employed?"

Response. Those plaintiffs who were residing in work release facilities during August, 1977, must be returned to work release facilities. Plaintiffs understand this reference to include members of the class who were formerly residing at the Albion Correctional Facility, and who were transferred to the Attica Correctional Facility on or about August 25, 1977. It should be remembered that if some of these plaintiffs have lost their jobs, this is due to defendants' illegal actions. Even if, as defendants anticipate, it proves difficult to find new positions for these plaintiffs, plaintiffs should not be required to suffer the effects of defendants' action by being required to reside at Attica, a maximum security facility with concomitant rigorous conditions of confinement. Plaintiffs believe that the Court's order should be applied to reinstate the status quo ante as nearly as possible, which would include return to less than maximum security facilities even for persons who have lost their jobs.

Those men who had not yet been transferred to a work release facility in August, 1977, have an equitable claim for transfer to a less secure facility, since defendants' actions have at the least delayed their search for employment by several months. However, plaintiffs believe that those persons who were actually residing in work release facilities, or with other work release inmates, should be given priority in being returned to those situations.

Question #7. "It is particularly important that the Court provide in its order specific answers to these questions. Specifically, the Court should stipulate the hours and days when plaintiff class inmates are to be released, since the Commissioner is of the opinion that these inmates are dangerous and therefore, he cannot authorize their release at this time consistent with his public responsibility."

Response. Plaintiffs believe that there is no need for the Court to specify the hours and days during which they are to be released.

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As to those plaintiffs who do still have employment or educational opportunities available to them, the memoranda of agreement previously signed by these men provide a clear yardstick, and represent decisions already made by defendants and their agents.

Insofar as the superintendents of the institutions in which plaintiffs are housed will be affected in the discretionary decisions they do make with regard to releasing plaintiffs (regarding weekend furloughs for those inmates who do not yet have job or school placements, for example), plaintiffs again request that the reevaluations of plaintiffs issued on or about August 25, 1977, be expunged, and that the superintendents be instructed not to use or consider these reevaluations against plaintiffs. The need for such expungement is demonstrated by decisions such as the one attached hereto as an exhibit.

Plaintiffs also request that the superintendents of the individual facilities at which plaintiffs are housed be instructed to permit plaintiffs to make extra telephone calls to their former employers, or other potential employers, to determine whether their jobs are still available.

Finally, plaintiffs reiterate their request that the stay previously imposed be lifted.

If the Court wishes further information or discussion concerning any of the points covered in these latest submissions, plaintiffs request that any conference be scheduled as soon as possible.

Respectfully submitted,

/s/

SUSAN N. HERMAN
DANIEL J. STEINBOCK
PIERCE GERETY, JR.
PRISONERS' LEGAL SERVICES OF N.Y.
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100 Church Street
New York, New York 10007

✓ cc: Kevin McKay, Esq.
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New York, New York 10047
Attorney for Defendants.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
JAMES TRACY, et al., :
Plaintiffs, :
v. :
DOMINICK SALAMACK, et al., :
Defendants. :
-----x

November 4, 1977
4:30 p.m.

Before:

HON. MORRIS E. LASKER,

District Judge.

A P P E A R A N C E S:

SUSAN N. HERMAN, ESQ.,
DANIEL STEINBOCK, ESQ.
Attorneys for plaintiffs
KEVIN MCKAY, ESQ.
Assistant Attorney General

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2 THE COURT: As a result of the discussion at
3 the last conference relating to the defendant's motion to
4 modify --

5 MS. HERMAN: Alter or amend.

6 THE COURT: -- the order contained in the memo-
7 randum of October 14, 1977, the Court requested defense
8 counsel to prepare a list of questions which they believed
9 the order of October 14th raised and for the plaintiff's
10 counsel to answer those questions, that is to give their
11 views as to what the proper answers were.

12 I have received a copy of an affidavit by Martin
13 F. Horn, a member of the staff of the Commissioner's office,
14 I take it, who sets forth the questions that are of concern
15 to the Commissioner and on which, if possible, he would like
16 clarification. Without dealing with the legal question of
17 what the Court's rule is in regard to such questions, I am
18 glad to be helpful, if I can.

19 I have also received a copy of Miss Herman's
20 answer to those questions as requested, dated November 1st.
21 I will review the questions and the responses of plaintiff's
22 counsel, and they will give my own view as to each of the
23 items.

24 Item number 1 is must the plaintiff class inmates
25 be returned to the same facilities from which they were

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2 removed on August 25, 1977. The position of the defendants
3 is, no, not necessarily. Plaintiffs should be returned to
4 the same facilities insofar as those facilities are still
5 in operation and so on. There is no point in my reading
6 into the record everything that they have written.

7 I agree with the plaintiff's motion on that point
8 which may take care of some of the concerns of the Commis-
9 sioner and I hope it does.

10 Question number 2 says if the answer to the fore-
11 going question is yes, must the department open the closed
12 work lease programs just for these inmates. The plaintiff's
13 position is that that is not necessary provided that there
14 are sufficient positions in the work release facilities now
15 open to accommodate the plaintiffs in a manner substantially
16 similar to their situations prior to August 25, 1977. I
17 don't know whether there are enough facilities open to
18 accommodate the plaintiffs or not. Do you, Mr. McKay?

19 MR. MCKAY: I could not affirmatively tell you
20 that there are or aren't. I believe that certainly gradually
21 they could find their way into work release facilities.

22 THE COURT: Let me say this. I would agree with
23 the plaintiffs that it was the obligation of the Commissioner
24 and the defendants to provide facilities to accommodate the
25 plaintiffs in a manner substantially similar to their

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2 situations as prior to August 25th, with the caveat that
3 nothing which the Court has done in this case in the past
4 or will do today is intended to interfere with his general
5 power to run his department.

6 Let us take an example. Suppose he decided that
7 for reasons completely unrelated to this program or the
8 behavior or lack of misbehavior of the defendants, he wanted
9 to shut down Tappan or he wanted to shut down Attica, as
10 far as that is concerned. Obviously, he would be free to
11 continue to make such decisions. I would suppose that had
12 such an event occurred which had an adverse impact on the
13 temporary release programs of these plaintiff class members
14 at an earlier time, that would not, certainly in itself, be
15 unconstitutional.

16 Question 3A is if the inmates need not be re-
17 turned to the very same facility from which they were removed,
18 must the inmates removed from New York City facilities be
19 returned to work release facilities in New York City. With-
20 out any explanation, plaintiff's counsel answers that ques-
21 tion yes, and I would like to have an explanation of what
22 the plaintiff's thinking is on that point because it doesn't
23 seem to me to be quite as obvious as it is apparently to
24 plaintiff's counsel.

25 MS. HELEN: In part, our response to question

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3B and also to question 2 were intended, to some extent, to cover that question. Our position is that the plaintiffs must be reinstated to facilities substantially similar to those in which they were incarcerated prior to August.

As to those plaintiffs who still do have jobs or educational opportunities available, if they are the same jobs or educational opportunities, they will be available in the same place where the plaintiff was. To that extent, certainly if one of the plaintiffs was, say, for example, incarcerated in Bayview and had a job in Manhattan, our position is that he should be returned to at least some place in the New York City vicinity so he would be able to attend to his job.

THE COURT: I can understand that, but I don't acknowledge that to be predicated on the fact that it is New York as distinguished from some other location. On the grounds that it is substantially similar to a situation prior to August 27th, is that right?

MS. HERMAN: I think --

THE COURT: On that rationale, I would agree that probably anybody who was in New York would have to be returned to New York in order to meet the requirements of a situation substantially similar to what he had prior to August 27th. Without meaning to quibble or be too liberal about it, if you

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2 had a job in Yonkers instead of New York City, for example,
3 I would not necessarily consider that unsatisfactory and so
4 on.

5 The next question is when and for how long each
6 day should members of the plaintiff class be released on job
7 search furloughs. The plaintiffs take a fair amount of time
8 to answer that, but I think their answer is intended to boil
9 down to substantially the same kinds of arrangements as
10 existed prior to August 25, 1977, and that would be my rul-
11 ing, as would be my ruling to the next question which is
12 must these inmates be permitted weekend family visits fur-
13 loughs; if so, when and with what degree of frequency.

14 I am a little confused by the question, number
15 5A, which is are the plaintiff class inmates to be rein-
16 stated subject to the same terms and conditions as existed
17 prior to August 25, 1977 because I thought that the original
18 order was clear there, but maybe the defendants didn't
19 understand that I meant that. Whatever they understood,
20 the answer to that question is yes, subject to the use of
21 the term "substantially similar."

22 The next question is at what point in time do
23 the members of the plaintiff class become subject to the new
24 regulations invoked by the Commissioner, I gather with re-
25 gard to the subject of temporary release programs.

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2 MR. MCKAY: Right.

3 THE COURT: The plaintiffs there state the posi-
4 tion that they agree to abide by new departmental regulations
5 governing their own behavior on temporary release and at the
6 work release facilities.

7 However, plaintiffs may not be removed -- this
8 is the statement of the plaintiff's position -- from the
9 program on the basis of a reevaluation of their prior
10 criminal or institutional records.

11 I agree with the plaintiff's position on that
12 point, subject to some minor qualifications that will be
13 stated in my more formal oral ruling on the application to
14 modify the earlier order which I will give when I am finished
15 answering these questions.

16 The next question is in the upstate facilities
17 must the plaintiff class inmates be housed with other work
18 release inmates, regardless of whether they are employed.

19 I find it somewhat difficult to understand the
20 thrust of that question. Perhaps you could --

21 MR. MCKAY: Your Honor, in some of the upstate
22 facilities, those inmates in a temporary release program
23 who have jobs are not housed in the same building as those
24 inmates who are still looking for jobs. The Commissioner
25 would like to know whether --

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THE COURT: I think that my view of the matter is subject to such rights as I will explain later in this discourse, those restored to the temporary release program, that is members of the plaintiff class, should be treated as they would have been treated if these events had never occurred.

Question 7 is not really a question. It asks the Court to stipulate the hours and days when plaintiff class inmates are to be released and plaintiff's response to that non-question designated as a question is that they disagree that it is required for the Court to do so.

I disagree also. I decline to name the hours and days, but I think I have made it perfectly clear what my view of the general obligation of the Commissioner is.

I also agree with the plaintiffs that for such further proceedings that may occur in connection with the continued eligibility or review -- any review of eligibility of the members of the plaintiff class, or I guess for other purposes relating to discipline and so on, should it arise, that the proceedings which brought about their removal from the temporary release program must be expunged except to the extent that they reveal any personal misbehavior on the part of any member of the plaintiff class which, of course, I do not think should be expunged.

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Now, I am prepared to wrap this up, I hope, by making the following statement.

MS. HERMAN: May I ask one question?

THE COURT: Yes.

MS. HERMAN: You stated you did agree that it was not necessary for the Court to specify the hours and days during which plaintiffs were to be released. One of the reasons why we took the position that it was not necessary for the Court to do so was that the memoranda of an agreement previously signed by the plaintiffs, at least as to those plaintiffs who still do have jobs and educational opportunities available, would provide a clear yardstick of the way in which these men had been treated before.

THE COURT: I should think that would be so.

MS. HERMAN: Thank you.

THE COURT: As previously indicated, the plaintiffs have moved to alter and amend the order and decision filed or dated October 14th. The principal thrust of the plaintiff's contentions is --

MS. HERMAN: Excuse me, your Honor, it is the defendants.

THE COURT: Excuse me, the defendants have moved, and the principal thrusts of the defendant's contentions is that even if the plaintiffs may have an entitlement

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2 to participate in the temporary release program, the Court
3 should, at least balance the rights accruing under the
4 entitlement against the "security" needs of the communities.

5 I place the word "security" in quotation marks
6 not to demean the concept but because I have no way of know-
7 ing the extent to which the security of the community may
8 actually be at risk, since I have no facts about that before
9 me.

10 No one can reject cavalierly a suggestion that
11 the security of the community may be jeopardized by a par-
12 ticular decision. Nevertheless, the argument remains less
13 than persuasive. It cannot carry the day because plaintiff's
14 entitlement in this case came into existence only after a
15 security check at the time each plaintiff was originally
16 admitted to the program, and no showing has been made of any
17 change in facts which warrants the withdrawal of a right
18 conferred on the basis of the earlier security check. The
19 situation may be understood by analogizing it to that of
20 a parolee. Parole, once granted, cannot be revoked by an
21 assertion on the part of the Parole Board at a later date
22 that its earlier decision was unsound or incorrect.

23 I believe that Morrissey against Brewer supports
24 that rationale. These observations compell the conclusion
25 that none of the members of the plaintiff class may be

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removed from the temporary release program on allegations of their participation which constitute a threat to the security of the community, except upon a showing in accordance with due process that a change of facts has occurred since the original determination permitting the inmates participation or the discovery by the defendants of new relevant facts which, although they existed at the time of the original decision, were unknown to the defendants through no fault of their own and through no lack of reasonable diligence on their part.

As to any inmate alleged to be a security risk under such circumstances, he shall be restored to the temporary release program, unless within 20 days from the filing of this order the charges against him are heard and determined in accordance with the requirements for hearings at correctional institutions set forth in *Wolff v. McDonnell*, 418 U. S. 539, 1974.

As to any inmates against whom it is not alleged that he was a security risk, he shall be restored to the temporary release program forthwith.

There is -- now, that concludes my decision on the motion to alter and amend. There is, in effect, a stay of injunction in the earlier order, and I advised the defendants at the last meeting that I would, if I decided the

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2 motion to alter or amend adversely to them, which I have,
3 continue the stay for a short period of time so that they
4 could appeal my determination, if they wished to do so. I
5 will do that again and state on the record now that the
6 injunction contained in the memorandum filed October 14,
7 1977 which has been stayed to date is stayed until 3:50 p.m.,
8 November 9, 1977, at which time the stay shall be dissolved
9 by this order.

10 I will be glad, if either of you feel that a
11 written order is desirable under the circumstances, to re-
12 ceive a proposed order.

13 MS. HERMAN: Your Honor, before the stay is con-
14 tinued, may I ask if Mr. McKay knows whether the defendants
15 desire to appeal.

16 MR. MCKAY: I do not know at this point. We
17 were really waiting to see what your Honor's order had to-
18 day. I don't know whether we intended to appeal it or not.

19 (Discussion off the record)

20 MR. STEINBOCK: When you say they may take people
21 off on the basis of information that was not known to the
22 defendants through no fault of their own, I assume you mean
23 the defendants, their agents and employees?

24 THE COURT: Yes.

25 MS. HERMAN: I have one other request. If there

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is to be no appeal, if this order is to go into effect, I would like to request that the defendants provide us with a list of all the people who will be covered by this order, because we have been representing the class. We don't know the names of all the individuals covered, and in order to see whether each person who has requested assistance from us is being taken care of under the order, we would like a list of --

MR. McKAY: I don't see any problem with that.

MS. HERMAN: May I raise another unrelated program which I am not sure your client's position will be is that several of the members of the plaintiff class who were removed from the work release program on August 25th, subsequently to that point have been designated as central monitoring cases. This is a new procedure which the Department has instituted which makes people ineligible for any program such as temporary release programs.

What I would like to know is whether the defendants are going to view that subsequent designation as presenting those plaintiffs so designated from being reinstated under the Court's order preventing --

MR. McKAY: Under the Court's order, I don't know how we can take that position.

(Court adjourned)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JAMES TRACY, WILLIAM ADAMS, ROBERT
ARNOLD, ARTHUR BETSCH, SANTOS
CEPEDA, DOUGLAS COLEMAN, HAROLD
GONZALEZ, LENNELL HOWARD, ELLIOT
HUNT, BILLY LITTLE, LARRY MOORE,
ROBERT OAKLEY, EMANUEL ORDINE, JR.,
LARRY PLEASANT, GEORGE REED, ANTHONY
REPETTI, CORDELL ROBINSON, WILLIAM
RODRIGUEZ, DENNIS SOARES, MICHAEL
THOMAS, and JOHN TURRISI, on behalf
of themselves and all others simi-
lary situated,

77 Civ. 3937

MEMORANDUM

Plaintiffs,

-against-

DOMINICK SALAMACK, Superintendent,
Bayview Correctional Facility;
CAPTAIN HYLAN T. SPERBECK, Correction
Officer, Bayview Correctional Faci-
lity; BENJAMIN WARD, Commissioner,
Department of Correctional Services,
State of New York,

Defendants.

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APPEARANCES:

PRISONERS' LEGAL SERVICES OF NEW YORK
100 Church Street
New York, New York 10007
Attorneys for Plaintiffs

Of Counsel: SUSAN N. HERMAN, ESQ.
DANIEL J. STEINBOCK, ESQ.
PIERCE GERETY, JR., ESQ.

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the State of New York
Two World Trade Center
New York, New York 10047
Attorney for Defendants

Of Counsel: KEVIN J. MCKAY, ESQ.
Assistant Attorney General

LASKER, D.J.

The defendants move to alter or amend our decision and order of October 14, 1977. They contend that even if the plaintiffs have an entitlement to participate in the temporary release program, the court should, at the least, balance the rights accruing under that entitlement against the "security" needs of the community. No one can reject cavalierly a suggestion that the security of the community may be jeopardized by a particular decision. Nevertheless, the argument remains less than persuasive. It cannot carry the day because plaintiffs' entitlement in this case came into existence only after a security check at the time each plaintiff was originally admitted to the program and no showing has been made of any change in facts which warrants the withdrawal of a right conferred on the basis of the earlier security check. The situation may be best understood by analogizing it to that of a parolee. Parole, once granted, cannot be revoked by an assertion of the parole board, at a later date, that its earlier decision was unsound or incorrect. Morrissey v. Brewer, 408 U.S. 471 (1972).

These observations compel the conclusion that none of the members of the plaintiff class may be removed from the temporary release program on allegations that their participation would constitute a threat to the

security of the community except upon a showing, in accordance with due process, that a change of facts has occurred since the original determination permitting the inmate's participation, or the discovery by the defendants of new relevant facts which, although they existed at the time of the original decision, were unknown to the defendants through no fault of their own and through no lack of reasonable diligence on their part. As to any inmate alleged to be a security risk under such circumstances, he shall be restored to the temporary release program unless within twenty days from the filing of this order the charges against him are heard and determined in accordance with the requirements for hearings at correctional institutions set forth in Wolff v. McDonnell, 418 U.S. 539 (1974).

It is so ordered.

Dated: New York, New York
November 7, 1977.

MORRIS E. LASKER

U.S.D.J.

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1577
UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the ~~fifteenth~~ day of ~~November~~, one thousand nine hundred and seventy-seven.

James Tracy, William Adams, Robert Arnold,
Arthur Betsch, Santos Cepeda, Douglas
Coleman, Harold Gonzalez, Lennell Howard, et al.,
Plaintiffs-Appellees

v.

Dominick Salamack, Superintendent, Bayview
Correctional Facility, Captain Hylan T.
Sperbeck, Correction Officer, Bayview Correctional
Facility, et al.,
Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the

appellant

~~appellee~~

~~appellee~~

~~appellee~~

by notice of motion dated November 10, 1977 for a stay

be and it hereby is granted

~~denied~~

It is further ordered that the briefing and argument schedule previously set shall be followed.

A. DANIEL FUSARO,
Clerk

By EDWARD J. GUARDARO,
Staff Attorney

BEFORE: HON. J. EDWARD LUMBARD

HON. WILLIAM H. MULLIGAN

HON. WILLIAM H. TIMBERS

Circuit Judges

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

BERNADETTE MERLINO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Defendants-Appellants
herein. On the 30th day of November , 1977 , she
served the annexed upon the following named person :

SUSAN HERMAN
New York Prisoners' Legal Services
100 Church Street
New York, N.Y. 10007

Attorney in the within entitled action by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by her for that purpose.

Bernadette Merlino

Sworn to before me this
30th day of November , 1977

Kenneth M. Kay
Assistant Attorney General
of the State of New York